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No. 10-

In The

SUPREME COURT OF THE UNITED STATES

TONYA MILLER-GOODWIN,

Petitioner,

v.

CITY OF PANAMA CITY BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a prima facie case of intentional discrimination require a judicial finding that the defendant gave more favorable treatment to a "nearly identical" comparator?

PARTIES

The petitioner is Tonya Miller-Goodwin.

The respondent is the City of Panama City Beach, Florida.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tonya Miller-Goodwin (hereinafter "Goodwin") respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on July 8, 2010.

OPINIONS BELOW

The July 8, 2010 opinion of the court of appeals, which is unofficially reported at 2010 WL 2689589 (11th Cir. 2010), and is set out at pp. 1a of the Appendix. The April 20, 2009 order of the district court is set out at pp. 19a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on July 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2000e of 42 U.S.C. provides in pertinent part:

(a) Employer practices

> It shall be an unlawful employment practice for an employer–
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This case concerns the Eleventh Circuit's "nearly identical" rule for resolving claims of intentional discrimination. Plaintiff Goodwin alleged that she had been the victim of gender discrimination in employment, and adduced evidence that the City of Panama City Beach treated females differently than males who routinely engaged in policy and rule violations. The court of appeals nonetheless dismissed Goodwin's claim, reasoning that she had failed even to establish a prima facie case because she failed to show that other male employees in the Department engaged in misconduct that was "nearly identical" to hers but were treated more favorably.

Petitioner Goodwin was a female law enforcement officer for the City of Panama City Beach Police Department from January 2002 to February 2, 2007. She was terminated following an Internal Affairs (IA) investigation finding that she committed seven policy violations. App. 21a.

Prior to January, 2006, despite a number of inappropriate sexual incidents and issues, Goodwin enjoyed her work and excelled as an employee. She received a promotion in May, 2005, to the position of Corporal and became a Field Training Officer (FTO) around February, 2005. R 40, ¶ 10. Prior to January, 2006, the only disciplinary actions she received were for an "at fault" traffic accident and for speeding. She acknowledged fault for both. R 40, ¶7.

Goodwin's problems started in 2006, after she told Major David Humphreys, the second in command within the City of Panama City Police Department (hereinafter "Department") that she would sue him and the boys club within the Department so fast it would make his head spin if he ever spanked her on her bottom again. R 40, ¶ 11. That same year, on June 2, 2006, Goodwin told a friend and coworker that she was tired of how she was being harassed by superior officers and gave her a hypothetical about one worker joining another in a lawsuit. Goodwin's intention was to find out if the coworker would join her in a lawsuit against the Department alleging gender discrimination. R 40, ¶ 17. The coworker told Humphreys about this conversation. R 40, ¶ 18.

After these events, Goodwin's employment with the Department changed and after a series of incidents, [r. ¶s 18-31, 47-51], on January 3, 2007, she was notified that an IA investigation was being initiated. The allegations included Goodwin telling a male recruit, Sam Hoskins, that he would be under her supervision for the next phase of training in the Field Training Officer (FTO) program and it was her job to get him fired or make him quit. R 40, ¶53; R 28, ¶ 19. Major Humphreys initiated the investigation and was the decisionmaker with respect to matters relating to the outcome of the IA. R 40, ¶s 11, 53, 64, 110, 111. Humphreys also picked the employees to be interviewed during the IA investigation. R 40, ¶ 83.

Goodwin was fired for allegations that she gave false testimony about the incident with the male recruit referenced above, for being on an unapproved internship and sitting in the communications room too long, i.e., loafing. Doc 40, ¶ 73. She disputed these allegations. R 40, ¶ 75.

At the time of Goodwin's investigation, Humphreys was well-aware of officers loafing while on duty because they were spending time doing extracurricular activities at his home. While on duty, officers frequently went to Humphreys' home. Other officers also made questionable calls on the police radio. R 40, ¶ 74. Other officers, including Humphreys, however, who took time off work during a shift were never disciplined. In fact, in addition to the male officers who went to Humphreys' home while they were on duty, male

officers solicited one another to leave work to play poker. One night on Goodwin's shift on December 16, 2006, a lieutenant called Goodwin to tell her to let another officer, David Walker, off duty so he could go play poker with him. This time off was not put on Walker's time sheet and it was left as if he had worked the full day. This occurred numerous times with male officers. R 40, ¶ 78.

Goodwin was fired on contrived allegations and for an alleged conflict in a "he said/she said" situation that occurred frequently in the Department's workplace with other officers but there were never IA investigations into the same type of conduct Goodwin was accused of. R 40, ¶ 82. Inconsistencies in testimony during IA investigations were also common. R 40, ¶ 84.

Rather than just focusing on the specific charges against Goodwin, the IA investigation was directed to find "every problem" employees had ever had with her. R 40, ¶s 112-113. More than thirty five people were interviewed for what the Department falsely claimed was an inconsistency in statements between Goodwin and Hoskins. R 40, ¶ 114. Evidence was provided in the district court that the Department used IA investigations to get rid of employees within the City of Panama City Beach Police Department. R 40, ¶ 116. "[I]f it's in their mind that they want you gone, they will come up with something in order to start an Internal Investigation." R 40, ¶ 116; see also R 40, ¶ 117.

In opposition to summary judgment, Goodwin offered evidence male employees who were treated more favorably and not terminated for conduct equally or more serious to that she was charged. R 40-44-52.

In opposition to summary judgment, Goodwin also offered evidence that there were other females who were the victims of retaliation after reporting sexual harassment within the City of Panama City Beach Police Department. Patricia Bond was fired, just like Goodwin, on contrived allegations after she reported sexual harassment. R 40, ¶ 102. Another former female officer, Donna Land, had the same problems Bond had with females being treated as "pieces of meat" by male employees, including Humphreys. R 40, ¶ 102.

The district court granted summary judgment in favor of the defendant. The court held that under Eleventh Circuit precedent a plaintiff cannot establish a prima facie case unless she can identify a comparator who was treated more favorably despite circumstances that are "nearly identical" to those of the plaintiff. The district court stressed that the "nearly identical" standard for comparators requires the identification of at least one male officer who violated the exact same Department policies as Goodwin. App. 13a. In response to Goodwin's claim that she was singled out for investigation and then discipline, the court explained because the IA investigation concluded that Goodwin committed seven violations of Department policy, even though she provided a

litany of other officers who should have been investigated and/or were guilty of policy violations, she did not provide any evidence that any of these officers violated the exact same policies she was accused of committing. App. 15a. Finding that the male officers were not "nearly identical" to Goodwin, the district court concluded that Goodwin had failed even to establish a prima facie case. App. 15a.

The court of appeals applied the "nearly identical" standard, explaining that Goodwin "did not show that other male employees of the Department engaged in misconduct that was nearly identical to hers, but were treated more favorably." App. 15a. In order to show the existence of a legally sufficient comparator, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." App. 11a. (quoting Maniccia v. Brown, 171 F. 3d 1364, 1368 (11th Cir. 1999)).

The Eleventh Circuit found that "[a]lthough the comparators identified by Goodwin arguably violated some of the Department's Rules and Regulations, and perhaps even violated one or more of the same Rules and Regulations that she was found to have violated, there has been no showing that any of them violated all of the Rules and Regulations that resulted in her termination or that their alleged misconduct was nearly identical to her." App. 15a. Applying that standard, the court of appeals found that the males treated more

favorably than Goodwin were not "proper comparators" because their infractions were not "nearly identical" to the misconduct with which Goodwin was charged. App.15a.

Although Goodwin had argued multiple males employees had engaged in misconduct that was equally if not more serious than that she was accused of, the court of appeals did not address that contention finding that she failed to identify any similarly situated male employee who engaged in misconduct "nearly identical" to hers. App. 15a. In the absence of a proper comparator, the panel held, Goodwin failed to establish a prima facie case of discrimination with respect to her termination, and the burden was not shifted to the appellee to provide a legitimate, nondiscriminatory reason for its actions. App. 15a. In the absence of a "proper comparator," gender based discrimination simply is not actionable.

REASON FOR GRANTING THE WRIT

Repeated decisions of this Court have fashioned a now well-established method for organizing and evaluating claims of intentional discrimination. Once a plaintiff establishes a prima facie case, the defendant must articulate a non-discriminatory reason for the disputed adverse action; the burden then returns to the plaintiff to establish by a preponderance of the evidence that the defendant acted with a discriminatory motive. These shifting burdens are not intended to create substantial intermediate barriers, but are "meant

only to aid courts and litigants in arranging the presentation of evidence." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986 (1988). This Court has repeatedly emphasized that the plaintiff's initial burden of proving a prima facie case is "not onerous." Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989); Watson, 487 U.S. at 986; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Despite this Court's disapproval of the imposition of any demanding evidentiary burden to establish a prima facie case, the Eleventh Circuit has created a standard that two decades of experience have shown to be virtually impossible to meet. In a long series of decisions, of which the instant case is typical, this circuit requires as an essential element of a prima facie case[1] that the plaintiff identify a specific individual outside the protected group in question whose circumstances were "nearly identical" to those of the plaintiff, and who nonetheless was treated more favorably. If, as here, a plaintiff has identified at least four males who committed the same and far worse violations, the plaintiff cannot establish a prima facie case, and the discrimination claim fails.

The Eleventh Circuit has applied the "nearly identical" requirement in more than 48

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1 In theory a plaintiff unable to identify a nearly identical comparator might be able to prove discrimination if he or she could produce "direct evidence" of discrimination. The Eleventh Circuit's "direct evidence" standard, however, is also virtually impossible to satisfy.

employment discrimination cases; no plaintiff has ever been able to meet that standard.[2] There are only few instances in which district courts in the Eleventh Circuit have found the plaintiff produced evidence sufficient to satisfy this exacting requirement.

The "nearly identical" rule utilized in the Eleventh Circuit, the only circuit to still use this rule, has three distinct elements. *First*, to establish a prima facie case of a discriminatory adverse action (e.g., a dismissal, demotion, or suspension), a plaintiff must demonstrate that he or she was treated less favorably than a similarly situated individual who is not a member of the protected group in question. *Second*, the individual with whom the plaintiff is compared is only similarly situated if the circumstances of that comparator and the plaintiff are "nearly identical". *Third*, the assessment of whether a comparator meets the "nearly identical" standard is a matter for the courts, not the trier of fact. In each of these respects the rule in the Eleventh Circuit has been expressly rejected by at least six other circuits.

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2 A list of Eleventh Circuit decisions applying the "nearly identical" standard is set out in an Appendix to this petition.

I. THE REQUIREMENT THAT ANY PRIMA FACIE CASE MUST INCLUDE PROOF THAT A SIMILARLY SITUATED COMPARATOR RECEIVED MORE FAVORABLE TREATMENT CONFLICTS WITH THE STANDARDS IN SIX CIRCUITS

Applying well-established Eleventh Circuit precedent, the court of appeals held that to establish a prima facie case of discrimination the plaintiff was required to show that "her employer treated similarly situated [white] employees more favorably." (quoting EEOC v. Joe's Stone Crab, Inc., 220 F. 3d 1263, 1286 (11th Cir. 2000)). The Eleventh Circuit has for years required, as an essential element of a prima facie case, that the plaintiff prove that the employer accorded more favorable treatment to an individual outside the protected group of which the plaintiff was a member (e.g., in the instant case, to a male comparator).

In the absence of that (or any other) essential element of a prima facie case, a plaintiff's claim fails as a matter of law. As a result, once the court of appeals in the instant case concluded that because Goodwin had "failed to identify any similarly situated male employee who engaged in misconduct nearly identical to her, but who received less severe disciplinary sanctions" App, 15a.. her claim was dismissed without further inquiry. In the absence of a "proper comparator," under the decision below, the employer was entitled to prevail, regardless of whether Goodwin

identified males who committed far worse infractions.[3] "If two employees are not 'similarly situated,' the different application of workplace rules does not constitute illegal discrimination." Lathem v. Department of Children and Youth Services, 172 F.3d 786, 793 (11th Cir.1989); see Wright v. Sanders Lead Co., 217 Fed.Appx. 925, 928 (11th Cir. 2007)(same).

The Eleventh Circuit is not alone in holding that a plaintiff a prima facie case of discrimination must include evidence that the defendant accorded

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3 The Eleventh Circuit has even held that when there is other evidence of discrimination like discriminatory remarks, that evidence is irrelevant if the plaintiff cannot also identify a proper comparator who received more favorable treatment, and thus is unable to establish a prima facie case. In Bell v. Capital Veneer Works, 2007 WL 245875 (11th Cir. 2007), the court of appeals held that the dismissal of the plaintiff's discriminatory dismissal/failure to rehire claim because, having failed to identify a "nearly identical" comparator, she was unable "to satisfy all elements of her prima facie case." 2007 WL 245875 at *2. The lack of a prima facie case was fatal to the plaintiff's claim, despite evidence that the decisionmaker had earlier remarked "[i]f I could run the mill myself, I would fire everyone [sic] of these niggers." 2007 WL 245875 at *2 n. 5. See Tomczyk v. Jocks & Jills Restaurants, LLC, 198 Fed. Appx. 804, 809 (11th Cir. 2006)(discrimination claim dismissed for want of a proper comparator despite "a slew of vulgar and harassing comments" by the plaintiff's supervisor "inflicted on [the plaintiff] because of race."); Mack v. S1 Mobile Aerospace Engineering, Inc., 195 Fed. Appx. 829, 838, 841 (11th Cir. 2006)(discrimination claim dismissed for want of a proper comparator even though "management directed racial derogatory words and jokes, such as 'boy,' 'nigger,' and the statement that 'you're the wrong fucking color,' toward the plaintiff . . . . and supervisors continued to display the [Confederate] flag.")

more favorable treatment to a valid comparator. That same definition of a prima facie case is applied in the Fourth[4], Fifth[5] and Seventh Circuits.[6] The Sixth Circuit has adopted a variant of the Eleventh Circuit prima facie case rule.[7] The Sixth Circuit has explicitly disapproved the First Circuit rule that evidence of more favorable treatment of a comparator need only be considered in showing pretext, and not as an element of a prima facie case. Clayton v. Meijer, Inc., 281 F. 3d 605, 609-10 (6th Cir. 2002).

A majority of the courts of appeals, however, have rejected this prima face case requirement. The First Circuit has expressly disapproved the Eleventh Circuit's rule.

> [T]he district court . . . followed the lead of the Eleventh Circuit and construed the prima facie requirement to call for a "show[ing] that . . . the misconduct for which [the plaintiff] was discharged was nearly identical to that engaged in by an employee outside the protected class whom the employer retained." Conward [v.

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4 Ford v. General Electric Lighting, LLC, 121 Fed. Appx. 1, 5 (4th Cir. 2005); Cook v. CSX Transp. Corp., 988 F. 2d 507, 501 (4th Cir. 1993).

5 E.g., Culwell v. City of Fort Worth, 468 F. 3d 868, 873 (5th Cir. 2006).

6 E.g., Filar v. Board of Ed. of City of Chicago, 526 F. 3d 1054, 1060 (7th Cir. 2008).

7 E.g., Wright v. Murray Guard, Inc., 455 F. 3d 702, 707 (6th Cir. 2006).

> Cambridge School Committee, 1998 WL 151248] at *3 (quoting Nix v. WLCY Radio/Rahall Communications, 738 F. 2d 1181, 1185 (11th Cir. 1984)) . . . [T]he district court's sequencing determination was in error, for the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual, when the need arises to test the pretextuality *vel non* of the employer's articulated reason . . . .

Conward v. Cambridge School Committee, 171 F. 3d 12, 19 (1st Cir. 1999).8

The Second Circuit requires that a plaintiff, in order to establish a prima facie case, need only show that the disputed adverse action "occurred under circumstances giving rise to an inference of discrimination." Graham v. Long Island Rail Road, 230 F. 3d 34, 38 (2d Cir. 2000). "A plaintiff *may* raise such an inference by showing that the employer . . . treated him less favorably than a similarly situated employee outside his protected group," *id.* at 39 (emphasis added), but is not limited to that particular method of proof.

> Defendants are wrong in their contention that [a plaintiff] cannot

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8 Kosereis v. Rhode Island, 331 F. 3d 207, 211 (1st Cir. 2003)("in disparate treatment cases, comparative evidence is to be treated as part of the pretext analysis, and not as part of the plaintiff's prim facie case.").

> make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently....Although her case would be stronger had she provide...such evidence, there is no requirement that such evidence be adduced.

Back v. Hastings on Hudson Union Free School District, 365 F. 3d 107, 121 (2d Cir. 2004)

The Third Circuit has also rejected the Eleventh Circuit prima facie case rule. In Marzano v. Computer Science Corp., Inc., 91 F. 3d 497 (3d Cir. 1996), the defendants argued that the standard for a prima facie case "encompasses the requirement that plaintiff show that *similarly situated* unprotected employees [were treated more favorably.]" 91 F. 3d at 510 (quoting brief for employer)(emphasis in opinion). The Third Circuit rejected that proposed requirement in language that aptly described the fatal flaw in the Eleventh Circuit "nearly identical" standard.

> [W]e reject Defendants' argument because it would seriously undermine legal protections against discrimination. Under their scheme, any employee whose employer can for some reason or other classify him or her as "unique" would no longer be allowed to demonstrate discrimination inferentially, but would be in the oft-

> impossible situation of having to offer direct proof of discrimination. . . .

91 F. 3d at 510-11.

In Bodett v. Coxcom, Inc., 366 F. 3d 736 (9th Cir. 2004),

> [t]he district court employed a *prima facie* test requiring [the plaintiff] to show that "other similarly situated employees outside of the protected class were treated more favorably.

366 F. 3d at 744.

The Ninth Circuit held that the district court had erred in limiting in that way the manner in which a plaintiff may establish a prima facie case.

> A plaintiff may show *either* that similarly situated individuals outside her protected class were treated differently *or* "other circumstances surrounding the adverse employment action give rise to an inference of discrimination."

Id. (emphasis in original; quoting Peterson v. Hewlett-Packard Co., 358 F. 3d 599, 603 (9th Cir. 2004)).

The Tenth Circuit has repeatedly rejected the Eleventh Circuit position that a plaintiff must

demonstrate the existence of a valid comparator in order to establish a prima facie case. In Nguyen v. Gambro BCT, Inc., 242 Fed. Appx. 483 (10th Cir. 2007), the district court had applied that Eleventh Circuit standard, requiring the plaintiff to show that she was "treated less favorably than a person outside the protected group." 242 Fed. Appx. at 487. The Tenth Circuit expressly disapproved that standard for establishing a prima facie case.

> The district court erred . . . in its articulation and application of prima facie case standards . . . . We held in Kendrick [v. Penske Transp. Servs., Inc., 220 F. 3d 1220 (10th Cir. 2000)] that the lower court committed error "in requiring [plaintiff] to show that [the employer] treated similarly-situated nonminority employees differently in order to [establish a prima facie case]." [220 F. 3d at 1229].

242 Fed. Appx. at 488.

The District of Columbia Circuit has also rejected the Eleventh Circuit rule. In Czekalski v. Peters, 475 F. 3d 360 (D.C.Cir. 2007), the district court had held that to establish a prima facie case a plaintiff "must demonstrate that she and a similarly situated person outside her protected class were treated disparately." 475 F. 3d at 365. The District of Columbia Circuit disapproved that standard. "As we said in George v. Leavitt [407 F.

3d 405 (D.C.Cir. 2005)], . . . '[t]his is not a correct statement of the law.' 407 F. 3d at 412." Id.

> One method by which a plaintiff can satisfy [the prima facie case standard] is by demonstrating that she was treated differently from similarly situated employees who are not part of the protected class. . . . But that is not the only way.

George v. Leavitt, 407 F. 3d at 412.

II. THE "NEARLY IDENTICAL" STANDARD CONFLICTS WITH THE STANDARDS IN EVERY OTHER CIRCUIT

A. The decision below applied the well-established Eleventh Circuit rule that comparative evidence is not sufficient to sustain a prima facie case unless the plaintiff and the proffered comparator are "nearly identical." As of 2009, the Fifth Circuit was the only other appeals court to use a "nearly identical" standard. But the Fifth Circuit has recently refined that standard to eliminate the "tension" with this Court's formulation of "comparable seriousness" in McDonald. In so doing, that court made a cogent observation:

> Each employee's track record at the company need not comprise the identical number of identical

> infractions, albeit these records must be comparable. As the Supreme Court has instructed, the similitude of employee violations may turn on the "comparable seriousness" of the offenses for which discipline was meted out and not necessarily on how a company codes an infraction under its rules and regulations. Otherwise, an employer could avoid liability for discriminatory practices simply by coding one employee's violation differently from another's.

Lee v. Kansas City Southern Ry. Co., 574 F.3d 253, 260-261 (5th Cir. 2009) (footnotes omitted).

This Court, in its recent opinion in Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379 (2008), also rejected in principle the use of a *per se* rule to decide the analogous question of use of evidence involving similar discrimination against others. The *per se* rule maintained by the Eleventh Circuit of keeping the comparator question from the jury on the strength of a "nearly-identical" standard should not pass muster under Mendelsohn. Certainly this would be true of the more extreme formulations of the standard such as the one here that requires identification of a comparator with the exact same seven allegations.

Precedent from this Court militates against placing comparator analysis in the *prima facie* stage rather than the pretext stage of the

McDonnell-Douglas burden-shifting analysis. This placement matters to the extent that some courts have refused evidence of employer mendacity in the excuses for firing on the ground that such an inquiry must await the pretext stage – a stage not to be reached for failure to show a nearly-identical comparator at the *prima facie* stage. McCann v. Tillman,526 F.3d 1370, 1375 n.6 (11th Cir. 2008), *cert. den. sub nom.*, McCann v. Cochran, 129 S.Ct.404 (2008). This is but another Catch-22. The McDonnell-Douglas shifting burdens are not to create substantial barriers to moving a case forward, but are "meant only to aid courts and litigants in arranging the presentation of evidence." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986 (1988). This Court has repeatedly emphasized that the plaintiff 's initial burden of proving a *prima facie* case is "not onerous." Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989); Texas Dept. of CommunityAffairs v. Burdine, 450 U.S. 248, 253 (1981). But "onerous" is precisely the term for the Eleventh Circuit's "nearly identical" standard, a standard which no appellate litigant in an employment discrimination case in that circuit has been able to satisfy.

The instant case sharply illustrates the exactitude required by the "nearly identical" standard. The most obvious error in the court's comparator analysis is the Catch-22 of requiring a high degree of congruence ("nearly identical") between the charges against Goodwin and the behavior of those she used as comparators while allowing the employer to withhold the facts

supporting the charges. In the summary judgment motion, the employer finally came forward with some allegations of misconduct, all disputed but for the one about lingering in the communications room. But the employer has yet to identify which alleged conduct breaks which of the seven cited rules. This is a critical omission that could insulate any employer from any comparator-based retaliatory-discipline complaint because it makes the firing decision unreviewable even in theory, especially under the doctrine applied here. The trial court drew that doctrine from the holding of McCalister v. Hillsborough County Sheriff, 211 Fed. Appx. 883, 886 (11th Cir. 2006), that a plaintiff fired for violating six policies must produce a comparator who violated the exact same six policies without being fired. In affirming that decision, the Eleventh Circuit applied that same standard – an even more exacting standard than that court's published opinions had applied..

Under Eleventh Circuit cases, a plaintiff is similarly situated to another employee only if the quantity and quality of the comparator's misconduct are "nearly identical." Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir.2006) (*citing* Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir.1999). But in following, McCalister, the court moved beyond "nearly identical" to identical in announcing a rule that Goodwin must produce a male comparator who violated the exact same seven rules without being fired. The court went still one step further in holding that not only comparators with less serious offenses would be

disqualified from consideration, but also those with more serious offenses. R 78-14. The rule applied below goes far beyond that to establish a regimen in which an employer could create a unique list of alleged rule violations for each discrimination victim. In this case, for example, something like the offense of "idle conversation" could be added to or omitted from any list of charges to prevent the list from qualifying as "nearly identical" to any comparator.

This case presents the additional issue of the comparators outside the protected class not being charged in the first place. So there is no list of charges to compare and no investigations of the misconduct of the favored class. In requiring Goodwin to show a comparator who committed the same seven offenses charged against her and acquitted, the court presumed an absence of discrimination in the charging process before even allowing consideration of discrimination in outcomes of charges. The trial court claims that Goodwin failed to show that the Department's high officials were aware of the offenses of the comparators, but a review of Goodwin's summary judgment fact statement (R-40) shows a painstaking documentation of who in the chain of command knew about the comparator offenses. Moreover, by permitting the Department to list seven rules allegedly violated without matching each rule with an act that violates it, the court makes it impossible to construct a matrix for comparison with treatment of those outside the protected class. The combination of characteristics

is so unique that it is unlikely that any officer in the entire state of Florida, other than the plaintiff herself, would fit that description.

This is not an issue of second-guessing employers' judgments or becoming a super-personnel board intruding on business judgment. It is an issue of testing the truthfulness – not the good faith – of an employer's excuse for a firing. The court below applied a standard that makes it impossible for this Plaintiff or any other to prove pretext by comparator evidence. That does not comport with this Court's comparator jurisprudence.

Ten circuits have rejected this avowedly stringent standard. Under the standard applied in a majority of the circuits, unlike the Eleventh Circuit, the sufficiency of comparative evidence is routinely upheld.

B. Six circuits, applying the same standard at both the prima facie case stage and in evaluating evidence of pretext, utilize a standard demonstrably different from and manifestly less restrictive than the "nearly identical" standard.

Four circuits utilize in discriminatory discipline claims a requirement that the action of a proffered comparator need only be of "comparable seriousness" to that for which the plaintiff was punished. That standard is applied in the Second[9],

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9 Graham v. Long Island Rail Road, 230 F. 3d 34, 40 (2d Cir. 2000).

Fourth[10], Sixth[11] and Seventh Circuits.[12] Plaintiffs are routinely able to satisfy this less stringent requirement.

Applying the "comparable seriousness" standard, for example, the Second Circuit has held that excessive absenteeism and engaging in the prohibited use of alcohol might reasonable be deemed of comparable seriousness, even though those infractions manifestly would not satisfy the "nearly identical" test.[13] The Second Circuit has expressly refused to require proof that the plaintiff and comparator had engaged in the same offense, reasoning that under such a requirement a plaintiff could not rely on evidence of more favorable treatment of a comparator whose record was worse (and thus different) than that of the plaintiff.[14]

The Fourth Circuit has made clear that the comparable seriousness standard can be satisfied even where the asserted infractions of a plaintiff are different than those of a proposed comparator.

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10 Featherstone v. United Parcel Services, Inc., 1995 WL 318596 at *4-*5 (4th Cir. 1995)(applying comparable seriousness standard); Cook v. CSX Transp. Corp., 988 F. 2d 507, 511 (4th Cir. 1993) (applying comparable seriousness standard.

11 Perry v. McGinnis, 209 F. 3d 597, 602 (6th Cir. 2000)(applying comparable seriousness standard).

12 Pierick v. Indiana University-Purdue University Athletics Dept., 510 F. 3d 681, 690 (7th Cir. 2007).

13 Graham, 230 F. 3d at 43.

14 Id. at 40.

> [T]he district court found that "although . . . there were [not] any white employees charged with the same combination of offenses as plaintiff," several white employees had violated [a particular rule], "the primary offense which had led to plaintiff's dismissal," and therefore had engaged in conduct of "comparable seriousness" to that of Cook. That finding commendably reflects an understanding . . . of the reality that the comparison will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances.

Cook v. CSX Transp. Corp., 988 F. 2d 507, 511 (4th Cir. 1993).

Decisions in the Seventh Circuit, in addition to at times using the "comparable seriousness" standard, have also articulated alternative tests. Panels in that circuit have required that a plaintiff control for "confounding variables,"[15] or demonstrate enough similarities to permit a "meaningful comparison,"[16] or held that the courts in deciding this issue should consider all "material" factors[17] or examine a particular list of

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15 Filar, 526 F. 3d at 1061.

16 Keys v. Foamex, L.P., 264 Fed. Appx. 507, 512 (7th Cir. 2008).

17 Henry at 564.

considerations.[18] Decisions in the Seventh Circuit have held a plaintiff's evidence sufficient under every one of these standards. The general tenor of these decisions is reflected in a recent opinion stressing that "a plaintiff need not present a doppelganger,"[19] and in several opinions emphasizing that the "similarly situated" requirement should be applied in a "flexible" rather than a "mechanica[l]", "unduly rigid" or "narrow" manner.[20] In Ezell v. Potter, 400 F. 3d 1041 (7th Cir. 2005), for example, the Seventh Circuit held that a postal worker disciplined for claiming pay for a period he did not work could be compared to other workers who had lost certified mail or altered records, even though these clearly were not "the same infraction." 400 F. 3d at 1049-50.

The Third Circuit does not utilize any specific standard for evaluating comparative evidence. Most frequently decisions in that circuit merely inquire whether the circumstances of the plaintiff and the proposed comparator are "similar," or simply comparing those circumstances at issue. E.g., Goosby v. Johnson & Johnson Medical, Inc., 228 F. 3d 313, 321 (3d Cir. 2000)(evidence sufficient to support finding that plaintiff and comparators had "similar weaknesses")(opinion by Alito, J.). Under both approaches the Third Circuit has

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18 Ezell v. Potter, 400 F. 3d 1041, 1049 (7th Cir. 2005) (plaintiff and comparator must be "similarly situated with respect to performance, qualifications and conduct).

19 Filar, 526 F. 3d at 1061.

20 Atanus, 520 F. 3d at 673; Keys, 264 Fed. Appx. at 512; Henry v. Jones, 507 F. 3d 558, 564 (7th Cir. 2007); Pierick, 510 F. 3d at 688.

repeatedly found comparative evidence sufficient to support an inference of discrimination.21 In Bennun v. Rutgers State University, 941 F. 2d 154 (3d Cir. 1991), for example, that circuit upheld the use of evidence comparing the treatment of a white and a Hispanic candidate for tenure, even though their particular strengths and weaknesses were somewhat different.

> Rutgers contends that they are not similarly situated because [the white candidate] was rated in outstanding in two [particular] categories . . . and [the Hispanic candidate] was not rated as highly in those categories. We cannot accept Rutgers' position. It would change "similarly situated" to "identically situated."

941 F. 2d at 178.

The First Circuit holds that comparative evidence is probative so long as the circumstances of the plaintiff and the comparator are "roughly equivalent." That Circuit has repeatedly found

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21 Messina v. E.I. DuPont de Nemours & Co., Inc., 141 Fed. Appx. 57, 59 (3d Cir. 2005)(comparative evidence sufficient to support prima facie case, even though misconduct of plaintiff was worse than that of comparator); Goosby, 228 F. 3d at 321 (sufficient evidence of preferential treatment of white males "with similar weaknesses"); Hopp v. City of Pittsburgh, 194 F. 3d 434, 439 (3d Cir. 1999)(finding of discrimination supported by evidence of more favorable treatment of "similarly situated" comparators)(opinion by Alito, J.).

plaintiffs' comparative evidence sufficient to meet this less stringent standard.[22]

C. Three circuits utilize a two tier standard for analyzing comparative evidence, applying a decidedly less demanding standard in determining whether that evidence is sufficient to establish a prima facie case.

The Eighth Circuit is particularly explicit in recognizing two different standards.

> At the prima facie case stage . . . , we choose to follow the low-threshold standard for determining whether employees are similarly situated . . . . Using a more rigorous standard at the prima facie stage would "conflate the prima facie case with the ultimate issue of discrimination . . ."

Rogers v. U.S. Bank, N.A., 417 F. 3d 845, 852 (8th Cir. 2005)(quoting Williams v. Ford Motor Co., 14 F. 3d 1305, 1308 (8th Cir. 1994). Under this avowedly "not onerous" standard a plaintiff and comparator need only have engaged in "similar" conduct. Rogers, 417 F. 3d at 851; see also Wheeler v. Aventis Pharmaceuticals, 360 F. 3d 853, 857-58 (8th Cir. 2004)(circumstances need only be "arguable . . . comparable"). "[D]ifferences in the

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22 Carey v. Mt. Desert Island Hospital, 156 F. 3d 31, 37 (1st Cir. 1998); Molloy v. Blanchard, 115 F. 3d 86, 92 (1st Cir. 1997).

severity and frequency of their violations and the surrounding circumstances" are irrelevant at the prima facie case stage, but should be considered only in determining whether the plaintiff has shown pretext. Rogers, 417 F. 3d at 52.

In evaluating whether comparative evidence would support a finding of pretext, the Eighth Circuit requires proof of infractions of "comparable seriousness. Even under that standard, however, the Eighth Circuit has expressly refused to require that the plaintiff and the comparator have committed the same infractions

> To require that employees always have to engage in the exact same offense as a prerequisite for finding them similarly situated would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination.

Lynn v. Deaconess Medical Center-West Campus, 160 F. 3d 484, 488 (8th Cir. 1998). The Eighth Circuit has repeatedly upheld the sufficiency of evidence under this comparable seriousness standard.[23]

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23 Lædbetter v. Alltel Corp. Services, Inc., 437 F. 3d 717, 723 (8th Cir. 2006); EEOC v. Kohler Co., 335 F. 3d 766, 776 (8th Cir. 2003).

The Tenth Circuit also takes a different approach in assessing whether comparative evidence supports a prima facie case and whether that evidence would support a finding of discrimination. At the prima facie case stage, the standard is avowedly "not onerous." Smith v. Oklahoma ex rel. Tulsa County District Attorney, 245 Fed. Appx. 807, 812 (10th Cir. 2007). That circuit does not consider at that stage an employer's explanation for differing treatment of seemingly similar employees.

> Although the district court concluded that th[e] . . . male employees were not similarly situated, its analysis turned on an assessment of the reasons offered by the [employer] for [the plaintiff's] termination. . . . However, at the prima facie case stage . . . "the employer's reasons for the adverse action are not appropriately brought as a challenge to the sufficiency of the plaintiff's prima facie case . . . ."

Id. (quoting Kenworthy v. Conoco, Inc., 979 F. 2d 1462, 1469-70 (10th Cir. 1992). At the pretext stage, on the other hand, the Tenth Circuit does consider the defendant's proffered explanation, applying the "comparable seriousness" standard in evaluating the comparative evidence. In McAlester v. United Air Lines, Inc., 851 F. 2d 1249 (10th Cir. 1988), that court of appeals upheld a jury verdict based on comparative evidence, despite the fact

that the plaintiff and the comparators had committed "different rule violations."

> The fact that these other employees did not commit the exact same offense as [the plaintiff] does not prohibit consideration of their testimony. It is sufficient if those employees did acts of comparable seriousness.

851 F. 2d at 1261; see EEOC v. BCI Coca-Cola Bottling Co., 450 F. 3d 476, 489-90 (10th Cir. 2006)(despite "factual differences" between the incidents, "[t]hey are similar enough"), cert. dismissed 127 S.Ct. 1931 (2007).

The Ninth Circuit uses the "comparable seriousness" standard to determine whether comparative evidence is probative of pretext.[24] At the prima facie case stage, however, that circuit appears in practice to use a less demanding standard, emphasizing that plaintiffs need provide "very little" evidence to establish a prima facie case.[25]

D. The existence of this inter-circuit conflict reflects quite deliberate decisions by the various circuits to reject standards applied in other circuits.

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24 Beck v. United Food and Commercial Workers Union, Local 99, 506 F. 3d 874, 885 (9th Cir. 2007).

25 Fields v. Riverside Cement Co., 226 Fed. Appx. 719, 722 (9th Cir. 2007); see Cornwell v. Electra Central Credit Union, 439 F. 3d 1018, 1031 (9th Cir. 2006).

In San Filippo v. Bongiovanni, 30 F. 3d 424 (3d Cir. 1994), the district court had applied a definition of "similarly situated" similar to the Eleventh Circuit "nearly identical" standard, requiring in a discipline case that the comparator's infractions be of the same "kind, number and scope" of the plaintiff. 30 F. 3d at 432; The Third Circuit reversed. "[T]he district court's definition of 'similarly situated' was too narrow. . . . ['P]recise equivalence in culpability between employees is not the question.[']" 30 F. 3d at 433 (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n. 11 (1976)).

In Jackson v. Fedex Corporate Services, Inc., 518 F. 3d 388 (6th Cir. 2008), the district court had applied an avowedly "high standard,"[26] 518 F. 3d at 391, 392, holding that the plaintiff had failed to identify a valid comparator, and thus had not made out a prima facie case, because "to be similarly situated [the comparator] with whom the Plaintiff seeks to compare treatment must have the same supervisor, be subject to the same standards, having engaged in similar conduct without differentials or mitigation." 518 F. 3d at 391. The Sixth Circuit rejected that standard.

> The district court's formulation of the similarly situated standard is exceedingly narrow. . . . The *prima*

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26 "High standard" is precisely the phrase used by district courts in the Eleventh Circuit to characterize the "nearly identical" rule. E.g., Zedeck v. Target Corp., 2008 WL 2225661 at *7 (S.D.Fla. 2008).

> *facie* case requirement is not onerous . . . . [T]he district court impermissibly placed a burden of producing a significant amount of evidence in order to establish a *prima facie* case. The purpose[s] of Title VII and 1981 are not served by an overly narrow application of the similarly situated standard.

518 F. 3d at 396-97.

In Josephs v. Pacific Bell, 443 F. 3d 1050 (9th Cir. 2005), the Ninth Circuit expressly rejected the "nearly identical standard." The employer, relying on Fifth Circuit precedent, argued that comparative evidence is inadmissible unless the comparator is "nearly identical" to the plaintiff[27]. The court of appeals held that to be admissible such evidence need only involve "similar conduct." 443 F. 3d at 1065.

In Cuevas v. American Express Travel Related Services Co., Inc., 256 Fed. Appx. 241 (11th Cir. 2007), the Eleventh Circuit expressly rejected the plaintiff's contention that comparative evidence should be evaluated under the "comparable seriousness" standard utilized in seven other circuits. The court of appeals cases supporting use of that standard were "contradict[ed]" by controlling Eleventh Circuit precedent. 256 Fed. Appx. at 243.

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[27] Brief of Defendant-Appellant, 2004 WL 5367149 at *47.

In 2000 and 2001, in a brief departure from Eleventh Circuit precedent, two panels in that circuit held that "the law only requires 'similar' misconduct from the similarly situated comparator," not "nearly identical conduct." Anderson v. WBMG-42, 253 F. 3d 561, 565 (11th Cir. 2001); Alexander v. Fulton County, 207 F. 3d 1303, 1334-35 (11th Cir. 2000. Judges in the Eleventh Circuit squarely recognized that the standard in these decisions was inconsistent with that circuit's "nearly identical" standard.[28] In Burke-Fowler v. Orange County, Fla., 447 F. 3d 11319 (11th Cir. 2006), the Eleventh Circuit reaffirmed its commitment to the "nearly identical" standard, explaining that the decisions in these cases "contradict[]" prior Eleventh Circuit precedent, and invoking that circuit's "'earliest case' rule to resolve intra-circuit splits." 447 F. 3d at 1322, n. 2. The *inter*-circuit split, however, remains.

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28 Dawson v. Henry County Police Dept., 238 Fed. Appx. 545, 548 n.2 (11th Cir. 2007)(Anderson and Alexander standard "less exacting" than the "nearly identical" rule); Wright v. Sanders Lead Co., Inc., 2006 WL 905336 at *8 (M.D. Ala. 2006) (Anderson and Alexander standard "less stringent" than the "nearly identical" rule).

III. THE REQUIREMENT THAT A PRIMA FACIE CASE MUST REST ON A JUDICIAL FINDING OF A LEGALLY SUFFICIENT COMPARATOR CONFLICTS WITH THE STANDARDS IN SIX CIRCUITS

Proceeding in a manner consistent with longstanding Eleventh Circuit practice, the panel in this case made its own determination as to whether the proffered comparators were sufficiently similar to the plaintiff, rather than treating those circumstances as evidence to be evaluated by the trier of fact. The Fourth[29], Fifth[30], and Seventh[31] Circuits also deem that determination the province of the courts, as if it were some sort of question of law, rather than according to a jury the responsibility for deciding whether or not a proffered comparison is persuasive. Six other circuits, however, properly regard the trier of fact as responsible for determining whether the plaintiff and a proffered comparator are sufficiently similar that dissimilar treatment raises an inference of discrimination.

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29 E.g., Ray v. CSX Transp., Inc., 189 Fed. Appx. 154, 160 (4th Cir. 2006)("the coworkers . . . were not engaged in conduct of comparable seriousness").

30 E.g., Bouie v. Equistar Chamicals L.P., 188 Fed. Appx. 233. 237 (5th Cir. 2006)(plaintiff's "situation is not nearly identical to that of the white employees who were not fired").

31 E.g., Fischer v. Avanade, Inc., 519 F. 3d 393, 402 (7th Cir 2008)("we find these two individuals were similarly situated").

The Second Circuit has repeatedly held that "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury." Graham v. Long Island Rail Road, 230 F. 3d 34, 39 (2d Cir. 2000).32 The District of Columbia Circuit also treats this as a matter for resolution by the trier of fact. George v. Leavitt, 407 F. 3d 405, 414 (D.C.Cir. 2005)(quoting Graham).

> [I]t should be resolved in the first instance by a jury, whose decision should be disturbed on appeal only if it could not reasonably be based upon the evidence properly received.

Barbour v. Browner, 181 F. 3d 1342, 1345 (D.C.Cir. 1999). The Tenth Circuit as well treats this issue as a question of fact for the jury. Riggs v. Airtran Airways, Inc., 497 F. 3d 1108, 1117 (10th Cir. 2007)(quoting George). The Ninth Circuit "agree[s] with our sister circuits that whether two employees are similarly situated is ordinarily a question of fact." Beck v. United Food and Commercial Workers Union, Local,*99*, 506 F. 3d 874, 885 n. 5 (9th Cir. 2007)(citing decisions in the Second, Tenth and District of Columbia Circuits).

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32 Brown v. City of Syracuse, 2006 WL 2091206 at *3 (2d Cir. 2006)(quoting Graham); Feingold v. New York, 366 F. 3d 138, 154 (2d Cir. 2004)("whether or not the non-disciplined [comparators] were similarly situated is a matter of factual dispute which is best resolved by a finder-of-fact"); Mandell v. County of Suffolk, 316 F. 3d 368, 379 (2d Cir. 2003)("Ordinarily, the question whether two employees are similarly situated is a question of fact for the jury.")

In Molloy v. Blanchard, 115 F. 3d 86 (1st Cir. 1997), the First Circuit upheld a jury's finding of discrimination reasoning, in part, that the plaintiff had "presented evidence sufficient for the jury to have found that . . . 'similarly situated' males had received dissimilar treatment." 115 F. 3d at 92. In a series of decisions the Third Circuit has insisted that the trier of fact is responsible for evaluating whether a comparator is similarly situated with the plaintiff.[33] The most recent Sixth Circuit decision insists that the evaluation of comparative evidence should be made by the trier of fact, so long as "a reasonable jury could infer that [the comparator's] conduct was of comparable seriousness." Macy v. Hopkins County School Bd. of Educ., 484 F. 3d 357, 369-71 and n. 8 (6th Cir. 2007).

IV. THE ELEVENTH CIRCUIT'S "NEARLY IDENTICAL" RULE CONFLICTS WITH THE DECISIONS OF THIS COURT

A. The Eleventh Circuit's insistence that a prima facie case must include evidence of differing treatment of a similarly situated (however defined) comparator is inconsistent with the decisions of this Court. "The *prima facie* case method established in McDonnell Douglas was 'never intended to be rigid, mechanized, or ritualistic.'" United States Postal Service Board of Governors v.

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33 Messina v. E.I. DuPont de Nemours & Co., Inc., 141 Fed. Appx. 57, 59 (3d Cir. 2005)(comparative evidence "sufficient . . . at the prima facie stage for a reasonable fact finder to conclude that [the defendant] treated [plaintiff] less favorably than others because of his race").

Aikens, 460 U.S. 711, 715 (1983)(quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)). Johnson v. California, 545 U.S. 162 (2005), explained that

> a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose."

545 U.S. at 169 (quoting Batson, 476 U.S. at 94)(footnote omitted). The application of any fixed formulation as to the elements of a prima facie case are inconsistent with Johnson and Aikens.

The particular rigid prima facie case rule established by the Eleventh Circuit--requiring (at least in discipline and dismissal cases) proof of a similarly situated comparator--is inconsistent with this Court's decision in United States v. Armstrong, 517 U.S. 456 (1996). In Armstrong this Court held that in the special circumstances of a claim of race-based selective prosecution, the defendant asserting that claim must as part of his prima facie case identify individuals of a different race who had engaged in the same conduct but not been prosecuted. That decision, however, was expressly limited to selective prosecution claims, which touch upon the unique discretion of the Executive Branch, and which unless carefully limited could chill law enforcement. 517 U.S. at 464-66. Armstrong made clear that this rule did not apply

to ordinary discrimination claims, such as a Batson claim, 517 U.S. at 467.

B. The "nearly identical" standard utilized by the Eleventh Circuits is also inconsistent with the decisions of this Court. This Court has repeatedly held that the standard for establishing a prima facie case is "not onerous." (See p. 9, supra). "Onerous" is precisely the term for the Eleventh Circuit's "nearly identical standard," a standard which no appellate litigant in that circuit has been able to satisfy.

Any distinction between "nearly identical" and "identical" in Eleventh Circuit cases exists only in theory. Years of experience demonstrate that the "nearly identical" standard is almost impossible to meet; in practice the "nearly identical" standard is indistinguishable from a requirement that the comparator actually be identical to the plaintiff. That is a requirement which this Court has expressly rejected.

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals is identical in all respects, and there is no reason to accept one. . . . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Miller-El v. Dretke, 545 U.S. 231, 247 n. 6 (2005). "Inoperable" is precisely what the federal prohibitions against discrimination become when subject to the "nearly identical" rule.

Decisions in the Eleventh Circuit have emphatically rejected suggestions that a plaintiff could rely on evidence of more favorable treatment of a comparator who was merely "similar," or whose misconduct was of "comparable seriousness" to that of the plaintiff. See supra. But those are precisely the standards approved by this Court. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court emphasized that in evaluating Green's discrimination

> [e]specially relevant . . . would be evidence that white employees involved in acts against [the employer] of *comparable seriousness* to [the actions of the plaintiff] were nevertheless retained or rehired.

411 U.S. at 804 (emphasis added). McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), reiterated that standard.

> Of course, precise equivalence in culpability between employees is not the ultimate question . . . . [T]hat other "employees involved in acts [against the employer's rules] of comparable seriousness . . . were

> nevertheless retained . . . " is adequate
>
> . . . .

427 U.S. at 283 n. 11 (quoting McDonnell Douglas).

In Miller-El v. Dtreke, 545 U.S. 231 (2005), the standard applied by this Court was whether white and black prospective jurors were "similarly situated." 545 U.S. at 247 n. 6. The Court found probative comparisons of white and black jurors were not "nearly identical" but merely "much [a]like" or "comparable", 545 U.S. at 248, 250 n. 8, noting as to one pair of jurors that there were "strong similarities as well as some differences." 545 U.S. at 247. That evidence was relied on to support, not a mere prima facie case, but a determination by this Court that the trial court's failure to find intentional discrimination was "wrong to a clear and convincing degree."

This Court rejected the Eleventh Circuit's variation on this same theme in establishing a requirement that, to overcome qualified immunity, a plaintiff must demonstrate so closely similar a precedent for an offending official's illegal conduct that handcuffing a prisoner to a hitching post could not serve as precedent for handcuffing a prisoner to a fence post. Hope v. Pelzer, 536 U.S. 730, 743 (2002). That holding is but a variation on the theme of this case – the requirement of a degree of congruence so exacting that no plaintiff can satisfy it.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals, Eleventh Circuit.

Tonya C. MILLER-GOODWIN,
Plaintiff-Appellant,
v.
CITY OF PANAMA CITY BEACH, FLORIDA,
Defendant-Appellee.

No. 09-12598.

July 8, 2010.

Richard E. Johnson, Melissa Horwitz, Law Office of Richard E. Johnson, Marie A. Mattox, Marie A. Mattox, P.A., Tallahassee, FL, for Miller-Goodwin

Michelle Leigh Buckalew, Coppins Monroe, Gwendolyn Palmer Adkins, Cooper, Monroe, Adkins, Dineman & Spellman, Tallahassee, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before EDMONDSON and MARCUS, Circuit Judges, and BARBOUR,* District Judge.

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* Honorable William Henry Barbour, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.

PER CURIAM.

Appellant, Tonya C. Miller-Goodwin ("Goodwin"), appeals the grant of summary judgment to her former employer, the City of Panama City Beach, Florida ("City"), on her claims of disparate treatment and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. § 2000e, *et seq.* Goodwin, who was once employed as a corporal and field training officer in the City's Police Department ("Department"), claims her employment changed on January 12, 2006, after one of the senior officers, Major David Humphreys ("Humphreys"), "slapped her on the buttocks" and she told him that if he ever touched her again she would "sue him and the boys' club so fast it would make his head spin." The employment changes cited by Goodwin include: Humphreys did not attend her wedding; she was not allowed to transfer personal belongings and other contents from her old patrol vehicle into a new vehicle at the station; she was not permitted to use compensatory time while attending college classes and was not allowed to drive her patrol car to class unless she was on duty; she was belitted by other officers; she was accused of not having her internship with the State Attorney's Office properly approved and, at the request of the Police Chief, was only permitted to do office work during her internship; she was denied supervisory duties and was denied a promotion to Relief Supervisor; and she received

counseling memoranda and unwarranted disciplinary actions. Goodwin's employment with the City was terminated on or about February 2, 2007, after an Internal Affairs Investigation of a complaint made against Goodwin by a new recruit found she had violated seven of the Department's Rules and Regulations.

Following the exhaustion of her administrative remedies, Goodwin filed a lawsuit alleging Title VII claims including disparate treatment and retaliation that were decided in favor of the City on summary judgment.[1]

On appeal, Goodwin argues the district court erred in granting summary judgment on her disparate treatment claims because it failed to consider all of the adverse actions about which she complained, and applied a too exacting comparator standard. With regard to her retaliation claim, Goodwin argues that the district court erred in finding she had not engaged in protected conduct for the purpose of establishing a retaliation claim, and further erred by not finding a nexus between the protected conduct and the alleged adverse employment actions. Finding no error, we AFFIRM.

We review a grant of summary judgment *de novo*, considering all the evidence in the light most favorable to the nonmoving party, and making all reasonable inferences in her favor. Brooks v.

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[1] Goodwin also alleged state law claims and a Title VII hostile work environment claim that were either dismissed or withdrawn during the proceedings below.

County Comm'n of Jefferson Cnty., Ala., 446 F.3d 1160, 1162 (11th Cir.2006). Summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Disparate Treatment

Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U .S.C. § 2000e-2(a). Here, Goodwin relies on circumstantial evidence to establish her disparate treatment claims. Accordingly, we test the sufficiency of those claims by applying the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See e.g. McCann v. Tillman, 526 F.3d 1370, 1373 (11th Cir.2008) ("Where ... there is no direct evidence of discrimination, a plaintiff may prove discrimination through circumstantial evidence, using the burden-shifting framework established in McDonnell Douglas ...").

To establish a *prima facie* case of disparate treatment, a plaintiff must show: (1) she is a member of a protected class; (2) she was subjected

to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job. McCann, 526 F.3d at 1373 (quoting EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir.2000)) (alterations in original). If the plaintiff is successful, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Id. (citing Burke-Fowler v. Orange Cnty., Fla., 447 F.3d 1319, 1323 (11th Cir.2006)). If it does so, the plaintiff must then prove the reason proffered by the defendant is a pretext for unlawful discrimination. Id. (citing Burke-Fowler, 447 F.3d at 1323).

There is no dispute that Goodwin satisfied the first and fourth prongs of a prima facie case of disparate treatment. Therefore, in determining whether a genuine issue of material fact existed, we only consider whether Goodwin suffered an adverse employment action and, if so, whether a similarly situated non-protected employee, in this case a male, was treated more favorably.

As regards the second prong of her prima facie disparate treatment case, Goodwin cites to a series of events beginning in January of 2006, and concluding with her termination in February of 2007, which she contends constitute adverse employment actions. These events are:

Late January of 2006-Humphreys did not attend Goodwin's wedding.

January 27, 2006-Goodwin was not permitted to transfer personal belongings and other contents from her old patrol vehicle to her new vehicle car at the police station.

May 5, 2006-Goodwin was told she had to use vacation time instead of compensatory time to attend college classes, and that she was no longer permitted to use her patrol vehicle to drive to classes unless she was already at work.

May 19, 2006-Goodwin was "belittled" by a lieutenant during a shift meeting.

June 1, 2006-Humpreys and another officer accused Goodwin of not having her college internship with the State Attorney's Office properly approved.

June 2, 2006-Goodwin discussed a hypothetical lawsuit with a female coworker to determine whether the latter would join her in filing a discrimination lawsuit against the City. The co-worker informed Humphreys of the conversation a short time thereafter.

On or about June 2, 2006-Goodwin was told that the "back hall" was mad at her, and she was not going to have supervisor duties for a while.

June 5, 2006-Goodwin was told by the then-State Attorney that he had been contacted by the Police Chief and asked that she only be assigned office work during her internship.

June 6, 2006-Goodwin was told she was being promoted to Relief Supervisor. Later that day, she was told "never mind" and that Humpreys had decided to wait and make the promotion the following week.
June 10, 2006-Goodwin was not given supervisory duties.

June 12, 2006-Corporal Chris Eaves was promoted to Relief Supervisor.

June 16, 2006-Goodwin was told to "watch her back".

July 18, 2006-A captain in the Department told Goodwin to not speak to his investigators, and that she should to talk to her Watch Commander. When she informed him that she was the Watch Commander on duty, he told her to call the "real" one at home.

September 29, 2006-Goodman received a counseling memorandum for spreading a rumor about a co-worker's extramarital affair.

September 30, 2006-Goodwin received a second counseling memorandum for failing to respond to a call.

October 28, 2006-Goodwin was denied promotion to Relief Supervisor.

December 12, 2006-Several officers ignored Goodwin at a Christmas party.

December 18, 2006-Goodwin was informed that the "higher-ups" believed corporals needed to be placed in zones and treated like officers.

December 19, 2006-Goodwin was accused of making a scene at a local retail store. Thereafter, she was placed in a zone.

December 23, 2006-Goodwin was not notified of an event cancellation when she was acting as Watch Commander.

January 2, 2007-Goodwin was notified that the Department was initiating an Internal Affairs Investigation based on a complaint a new recruit had made against her.

February 2, 2007-Goodwin's employment with the City was terminated after the Internal Affairs Investigation found she had violated seven of the Department's Rules and Regulations.

Of the adverse employment actions claimed by Goodwin, we only consider those occurring on or after July 28, 2006, because her Charge of Discrimination was filed with the Florida Commission on Human Relations on March 23, 2007. See *e.g.* National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) ("A discrete ... discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within either 180 or

300 days of the date of the act or lose the ability to recover for it.").

Of the timely allegations, the majority do not constitute adverse employment actions for the purposes of maintaining a disparate treatment claim. "[T]o prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a *serious and material* change in the terms, conditions, or privileges of employment. Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir.2001). Goodwin's claims that she was ignored at a party, was not told of an event cancellation, and was accused of making a scene are not actionable because they do not evidence any change in the terms, conditions, or privileges of her employment. Goodwin's claims that she had to use vacation time instead of compensatory time to attend college classes, she could not drive her patrol vehicle to class unless on duty, she was placed in a zone, and she received two counseling memoranda are likewise not actionable because, under the circumstances, they have not been shown to have constituted a serious and material change in the terms, conditions, or privileges of her employment. See *e.g.* id. at 1240 (finding that receipt of negative job performance memoranda did not constitute adverse employment actions in a case in which there was no showing

that the plaintiff suffered any tangible consequence-loss of pay, benefits, or further discipline-as a result of receiving the memoranda). Accordingly, we find the district court did not err by rejecting these alleged employment actions when considering Goodwin's claim of disparate treatment.

Goodwin's claims that she was denied promotion to Relief Supervisor in October of 2006, and was terminated from her employment for disciplinary reasons following an Internal Affairs Investigation, however, constitute adverse employment actions, thereby satisfying the second prong of her *prima facie* disparate treatment case. Thus, the focus turns to whether Goodwin has shown that a similarly situated male employee was treated more favorably in like situations.

Goodwin has failed to establish a *prima facie* case with regard to her failure to promote claim. While the record shows that a male officer was assigned the Relief Supervisor position, the record also shows that the male officer was promoted because he (a sergeant) out-ranked Goodwin (a corporal) in the Department. Based on the difference in rank, Goodwin has failed to show that she and the male officer who was promoted to the Relief Supervisor position were similarly situated. See Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1091 (11th Cir.2004) (explaining the "comparator must be similarly situated in all relevant respects" and "nearly identical to the plaintiff."). Additionally, as the City articulated a legitimate,

nondiscriminatory reason for the alleged adverse employment action, i.e. the male officer was of a higher rank than Goodwin, it has satisfied the second phase of the burden-shifting framework of McDonnell Douglas. Goodwin did not present any evidence that the City's legitimate, non-discriminatory reason for promoting the higher-ranking male officer, instead of her, was pretextual.

Goodwin has also failed to establish a *prima facie* case with regard to her discriminatory discipline/termination claim. "When a plaintiff alleges discriminatory discipline, to determine whether employees are similarly situated, we evaluate 'whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.'" Burke-Fowler, 447 F.3d at 1323 (quoting Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir.1999) (alterations in original). In so doing, "[w]e require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Id. (quoting Maniccia, 171 F.3d at 1368). See also Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1185 (11th Cir.1984)("We have consistently held that a plaintiff fired for misconduct makes out a prima facie case of discriminatory discharge if he shows that he is a member of a protected class, that he was qualified for the job from which he was fired, and that the misconduct for which he was discharged was nearly identical to that engaged in

by an employee outside the protected class whom the employer retained.") (alterations in original).[2]

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[2] Goodwin argues that because hers is a rules violation claim, to establish a prima facie case of disparate treatment she was required to show that she was a member of a protected class and "either (a) that [s]he did not violate the work rule, or (b) that [s]he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against [her] were more severe than those enforced against the other persons who engaged in similar misconduct." Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir.1989). Under this standard, Goodwin argues that the district court erred in failing to find an issue of material fact on her prima facie case because she contested whether she had committed the rule violations that were the basis for her termination.

This Court has previously examined the above quoted language in Jones and determined:

Considering the facts in Jones, our impression is that words about "did not violate the work rule" are unnecessary to the decision in Jones and are dicta; but we will discuss them. The pertinent words in Jones demand not two, but three, elements: (1) the plaintiff is a member of a protected class; (2) the plaintiff has engaged either (a) disputedly or (b) admittedly in misconduct similar to persons outside the protected class; and (3) that similarly situated, nonminority employees (that is, persons outside the protected class) received more favorable treatment.
We stress that, under the Jones formulation, no plaintiff can make out a prima facie case by showing just that she belongs to a protected class and that she did not violate her employer's work rule. The plaintiff must also point to someone similarly situated (but outside the protected class) who disputed a violation of the rule and who was, in fact, treated better.
Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 n. 6, reh'g denied and opinion superseded in part, 151 F.3d

The City contends that Goodwin was terminated after it discovered, during an Internal Affairs Investigation that was initiated in response to a complaint made against her by a new recruit, that she had violated seven Department Rules and Regulations, including making false and/or dishonest statements, failing to properly supervise and/or disciple subordinates, failing to comply with directives and orders, failing to properly patrol a zone, loafing, and improper use of radio and established communications procedures. Goodwin, however, maintains that the City engaged in discriminatory discipline/termination because male officers who engaged in misconduct more serious than that of which she was accused, were not investigated or terminated. Here, the district court correctly granted summary judgment on Goodwin's discriminatory discipline/termination claim because she did not show that other male employees of the Department engaged in misconduct that was nearly identical to hers, but were treated more favorably.[3] As would-be

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1321 (11th Cir.1998). Thus, regardless of whether Goodwin had committed the alleged rule violations, she is still required to show that a similarly situated male who had committed the same rule violations received more favorable treatment than her.

[3] Goodwin argues that the district court applied too exacting a comparator standard when reviewing her disparate treatment claims. We find no merit in this argument as the district court correctly applied the governing "nearly identical" standard when considering the potential comparators identified by Goodwin. We likewise find no merit in Goodwin's argument that the "nearly identical" standard must be revised in light

comparators, Goodwin identifies Sergeant Richard McClanahan and claims that he was not investigated for falsifying a probable cause affidavit and engaging in an illegal search, and that he only received written reprimands and/or suspensions for having: failed to properly document civilian passengers in his police vehicle, associated with an individual being investigated by the FBI while on duty, and allowed a police canine to attack an arrestee who was already under police control. Goodwin next identifies Nathan Dean who she claims was not terminated even though he engaged in conduct unbecoming of an officer by displaying his badge while intoxicated, discussing "kicking someone's ass", and interfering with a traffic stop. Goodwin also claims that Chris Eaves lied on his employment application, engaged in conduct unbecoming an officer including deception, was found guilty of neglect of duty, and was charged with failure to comply with orders. Finally, Goodwin claims that Humphreys had a history of inappropriate conduct toward women, received a written reprimand for conduct unbecoming an officer, came to a crime scene smelling of alcohol, and drove his police vehicle while intoxicated.

Although the comparators identified by Goodwin arguably violated some of the Department's Rules and Regulations, and perhaps even violated one or more of the same Rules and

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of the United States Supreme Court decision in Sprint/United Mgmt. Co. v. Mendelson, 552 U.S. 379, 128 S.Ct. 1140, 170 L.Ed.2d 1 (2008), and, therefore, decline her invitation to so do.

Regulations that she was found to have violated, there has been no showing that any of them violated all of the Rules and Regulations that resulted in her termination or that their alleged misconduct was nearly identical to hers. Having viewed the evidence in Goodwin's favor, we find she has failed to identify any similarly situated male employee who engaged in misconduct nearly identical to hers, but who received less severe disciplinary sanctions. Accordingly, as Goodwin has failed to present proper comparators, we find that she has failed to establish a *prima facie* case with regard to her discriminatory discipline claim.

Retaliation

Goodwin argues that the district court erred in granting summary judgment on her retaliation claim. To establish a *prima facie* case of retaliation under Title VII, a plaintiff must show: "(1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) the adverse action was causally related to the protected activity." Webb-Edwards v. Orange Cnty. Sheriff's Office, 525 F.3d 1013, 1028 (11th Cir.2008). If her employer then articulates a legitimate reason for its actions, the plaintiff must show that the "proffered reasons for taking the adverse action were actually a pretext for prohibited retaliatory conduct." McCann, 526 F.3d at 1375 (quoting Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056, 1059 (11th Cir.1999)). To show pretext, the plaintiff must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or

contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Id. (quotation omitted).

Goodwin argues that she engaged in two acts of statutorily protected expression. The first was on January 12, 2006, when she threatened to file suit if Humphreys ever touched her again. The second was on June 2, 2006, when she discussed filing a hypothetical discrimination lawsuit with one of her female coworkers. Even if we assume, *arguendo*, that these activities satisfy the first prong of Goodwin's *prima facie* case of retaliation, she has not shown that she suffered an adverse employment action that was causally related to those expressions.

In support of the second prong of her *prima facie* retaliation claim, Goodwin cites to the same adverse employment actions that were alleged in support of her disparate treatment claim. Of the adverse employment actions alleged, we again only consider those occurring on or after July 28, 2006, as the others are time barred. See Morgan, 536 U.S. at 110) ("A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it."); Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 971-72 & n. 35 (11th Cir.2008) (finding that the time-bar for a Title VII retaliation claim is measured from the date the plaintiff files her EEOC charges). An

adverse employment action for the purpose of a retaliation claim includes employer conduct that has a materially adverse effect on the plaintiff, irrespective of whether it is employment or workplace-related. See Crawford v. Carroll, 529 F.3d 961, 973 (11th Cir.2008) (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)). To be actionable, the "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." White, 548 U.S. at 68.

Viewing the evidence in Goodwin's favor, the first timely and potentially adverse employment action she alleges is her receipt of a counseling memorandum on September 29, 2006. Even if we were to accept the counseling memorandum as an adverse employment action, because Goodwin's receipt of that memorandum followed her January 12, 2006, threat to sue by eight months, and followed her June 2, 2006, conversation with a co-worker regarding potential litigation by four months, she has failed to create a jury question as to causation with regard to that action. See *e.g.* Drago v. Jenne, 453 F.3d 1301, 1308 (11th Cir.2006) (finding a three month period between a protected activity and an adverse employment action was not sufficiently proximate to show causation on a retaliation claim); Higdon v. Jackson, 393 F.3d 1211, 1221 (11th Cir.2004) ("By itself, [a] three month [intervening] period ... does

not allow a reasonable inference of a causal relation between [a] protected expression and [an] adverse action" (citing Clark Cnty. Sch. Dist. v. Breedon, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)); Wascura v. City of South Miami, 257 F.3d 1238, 1248 (11th Cir.2001) (finding that a three and one-half month temporal proximity between a protected activity and an adverse employment action "is insufficient to create a jury issue on causation."). As the remainder of the alleged adverse employment actions are further removed in time from the protected activities, Goodwin has likewise failed to create a jury question as to causation with regard to those actions. Because Goodwin cannot establish a prima facie case of retaliation, the district court properly entered summary judgment in favor of the City on this claim.

For the reasons stated above, the district court's grant of summary judgment on Goodwin's disparate treatment and retaliation claims is AFFIRMED.

United States District Court, N.D. Florida,
Panama City Division

Tonya C. MILLER-GOODWIN, Plaintiff,

v.

CITY OF PANAMA CITY BEACH, FLORIDA,
Defendant.

Civil Action No. 5:08-cv-228/RS/EMT

ORDER

RICHARD SMOAK, District Judge

Before me are Defendant's Motion for Summary Judgment (Doc. 27) and Plaintiff's Response in Opposition (Doc. 43). Defendant's Motion for Summary Judgment is GRANTED.

I. STANDARD OF REVIEW

The basic issue before the court on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S. Ct. 2505, 2512 (1986). The moving party has the burden of showing the absence of a genuine issue as to any material fact, and in deciding whether the movant has met this burden, the court must view the movants evidence and all factual inferences arising from it in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). Thus, if reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment. Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1534 (11th Cir. 1992) (citing Mercantile Bank & Trust v. Fidelity & Deposit Co., 750 F.2d 838, 841 (11th Cir. 1985)). However, a mere "scintilla" of evidence supporting the nonmoving party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party. Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990) (citing Anderson, 477 U.S. at 251).

II. BACKGROUND

Plaintiff Tonya Miller-Goodwin is a white female who was employed by the Panama City

Police Department ("Department") from January 2002 to February 2, 2007, when she was terminated following an Internal Affairs (IA) investigation that had been opened to investigate a complaint that had been lodged by a fellow officer against Plaintiff. As a result of the IA investigation, the Chief of Police had recommended that Plaintiff be terminated for seven violations of the Department's Rules and Regulations. As part of a negotiated settlement with the City, however, Plaintiff admitted five of the seven violations of Department's Rules and Regulations in return for being permitted to resign. Plaintiff's resignation was accepted in April 2007. During the course of the IA investigation, the investigation was expended to investigate two other officers . a male and a female who were likewise terminated. On May 23, 2007, Plaintiff filed a charge of discrimination with the Florida Commission on Human Relations (FCHR) alleging discrimination based on gender and age, and alleging sexual harassment and retaliation. The FCHR investigated Plaintiff's claims and issued a No Cause determination on September 4, 2007. Plaintiff filed a complaint with the EEOC and was issued a right-to-sue letter on March 13, 2008.

At the time of Plaintiff's resignation, she had attained the rank of corporal and was designated as a Field Training Officer (FTO), responsible for teaching new recruits the Department's policies and procedures and providing recruits on-the-job training. All Department employees are required to abide by the Department's Code of Conduct which

contains a series of "General Orders." Upon employment, new employees are required to become familiar with Department policies within their first twenty days on the job.

Plaintiff filed this lawsuit pursuant to 42 U.S.C § 2000e *et seq.* (Title VII) alleging gender discrimination and retaliation. Plaintiff did not proceed on a hostile work environment claim. (Doc. 41). Plaintiff contends that the IA investigation was opened on account of her gender and "had the situation involved a male training officer, there would have not been any such action taken." (Doc. 1, ¶ 6) Plaintiff further contends that Defendant retaliated against her for threatening to sue a fellow police officer after being "smacked on her rear end." (Doc. 40, ¶ 11).

III. ANALYSIS

A. Gender Discrimination

Plaintiff claims that her termination by the City was discriminatory and violated Title VII. Title VII prohibits an employer from "discharge[ing] any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual.s race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a). "The two theories of intentional discrimination under Title VII are disparate treatment discrimination and pattern or practice discrimination." Burke-Fowler v. Orange County,

Fla., 447 F.3d 1319, 1322 (11th Cir. 2006). Plaintiff alleges that she suffered discrimination only under the theory of disparate treatment. Therefore, only this form of discrimination will be analyzed.

1. Disparate Treatment

"Disparate treatment claims require proof of discriminatory intent either through direct or circumstantial evidence." Equal Employment Opportunity Comm'n v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000). A prima facie claim of discrimination can be established three ways: 1) direct evidence; 2) circumstantial evidence; or 3) statistical proof. Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). "Direct evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." Cuban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990) (citing Hill v. Metro. Atlanta Rapid Transid Auth., 841 F.2d 1533, 1539 (11th Cir. 1988). "Only the most blatant remarks, whose intent could be nothing more than to discriminate . . .. will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets, Inc., 196 F.3d 1354, 1359 (11th Cir. 1999) (citing Early, 907 F.2d at 1081-82). Plaintiff does not allege any blatantly discriminatory remarks made by Defendant; her claims are based entirely on circumstantial evidence.

In analyzing Plaintiff's circumstantial evidence of discrimination, a district court must apply the three-tiered approach set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) and refined by Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95 (1981). Under the McDonnell Douglas analysis, a plaintiff is required to first establish, by a preponderance of the evidence, a prima facie case that creates a rebuttable presumption of unlawful discrimination. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. "The plaintiff's burden of establishing a prima facie case serves, in part, to assure that the plaintiff has some competent proof that she was treated differently than similarly situated employees." Lang v. Star Herald, 107 F.3d 1308, 1312 (8th Cir. 1997). Second, if the plaintiff successfully established the prima facie case of discrimination, the burden of production "then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. Finally, if the employer successfully articulates some legitimate, nondiscriminatory reason for the employee's rejection, the plaintiff must demonstrate by a preponderance of the evidence that the employer's stated reason for rejecting the employee was merely a pretext for discriminating against her. *Id.* at 804, 93 S.Ct. at 1825. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff

remains at all times with the plaintiff." Burdine, 450 U.S. at 253, 101 S.Ct. at 1093.

a. Prima Facie Case

Under the McDonnell Douglas framework, "the plaintiff first has the burden of establishing a prima facie case of discrimination, which creates a rebuttable presumption that the employer acted illegally." McCalister v. Hillsborough County Sheriff, 211 F. App.x 883, 885 (11th Cir. 2006). To establish a prima facie case of disparate treatment based on circumstantial evidence, a plaintiff must show: 1) she is a member of a protected class; 2) she was qualified for the job; 3) she suffered an adverse employment action; and 4) she was replaced by a person outside her protected class or was treated less favorably than a similarly situated individual outside her protected class. Maynard v. Bd. of Regents of the Div. of Univs. of the Florida Dep't of Educ., 342 F.3d 1281, 1287 (11th Cir. 2003); Ivey v. Paulson, 222 F. App.x 815, 817 (11th Cir. 2007). An adverse employment action is "'an ultimate employment decision , such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, that deprives him or her of employment opportunities, or adversely affects his or her status as an employee.'" Galloway v. Georgia Tech. Auth., 182 F. App.x 877, 880 (11th Cir. 2006) (quoting Gupta v. Florida Bd. of Regents, 212 F.3d 571, 597 (11th Cir. 2000)). "To make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that [s]he and

the employees are similarly situated in all relevant aspects."Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). A plaintiff is similarly situated to another employee only if "the quantity and quality of the comparator's misconduct [are] nearly identical." Burke-Fowler, 447 F.3d at 1368. It is necessary for a court to "consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Greer v. Birmingham Beverage Co., Inc., 291 F. App.x 943, 946 (11th Cir. 2008) (citing Holifield, 115 F.3d at 1562).

b. Employer's Legitimate Nondiscriminatory Reason

Once a plaintiff establishes a prima facie case for discriminatory action, the burden shifts to the defendant who must then articulate a legitimate, nondiscriminatory reason for taking the action. In showing that it had a legitimate, nondiscriminatory reason, the defendant's burden is "exceedingly light." Perryman v. Johnson Prods. Co., Inc., 689 F.2d 1138, 1142 (11th Cir. 1983) (citing Burdine, 450 U.S. at 254 55, 101 S.Ct. at 1094). "The defendant only needs to produce evidence of a reason for its decision; it does not need to prove that it was actually motivated by that explanation." Sermons v. Fleetwood Homes of Georgia, 227 F. Supp. 2d 1368, 1380 (S.D. Ga. 2002) (citing Burdine, 450 U.S. at 254, 101 S.Ct. at 1094). "[The proffered reason] is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Burdine, 450 U.S. at 254-55, 101 S.Ct. at

1094. The defendant's burden at this stage is a burden of production, not persuasion. Cooper v. Southern Co., 390 F.3d 695, 725 (11th cir. 2004).

c. Pretext

Once a defendant offers a legitimate, nondiscriminatory reason for its actions, "the plaintiff must attack that reason 'head on and rebut it' so as to show that the reason is really a pretext for discrimination." Sermons, 227 F. Supp. 2d at 1381 (quoting Chapman v. Al Transport, 229 F.3d 1012, 1030 (11th Cir. 2000)). Pretext can be established by evidence which "cast[s] sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable fact finder to conclude that the employer's proffered legitimate reasons were not what actually motivated its conduct." Crawford v. Carroll, 529 F.3d 961, 976 (11th Cir. 2008) (citing Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997). Stated differently, "the plaintiff may attempt to establish that [s]he was the victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S.Ct. 2097, 2106 (2000) (quoting Burdine, 450 U.S. at 256, 101 S.Ct. at 1095). The proffered explanation is unworthy of belief if the plaintiff demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder"could disbelieve it. Combs, 106 F.3d at

1538 (quoting Sheridan v. E. I. DuPont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996). In order to prove pretext, the plaintiff may offer "direct evidence of discrimination in the form of statements and admissions or by circumstantial evidence in the form of statements and admissions or by circumstantial evidence in the form of comparative or statistical evidence." Woody v. St. Clair County Comm'n, 885 F.2d 1557, 1560 (11th Cir. 1989) (citing Miles v. M. N. C. Corp., 750 F.2d 867, 870 (11th Cir. 1985)). The plaintiff may also establish pretext by showing that the employer did not rely on the proffered explanations for its actions. See Israel v. Sonic-Montgomery FLM, Inc., 231 F. Supp 2d 1156, 1162 (M.D. Ala. 2002) (citing Chapman, 229 F.3d at 1024).

Application

Plaintiff has alleged multiple acts of gender discrimination. Most of these allegations did not adversely affect Plaintiff's employment, however, and will not be considered. Of the many acts complained of, Plaintiff details two incidents where she was treated differently on account of her gender and where there was some adverse employment action.[1] I will analyze each of these

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[1] Plaintiff alleges in her Response in Opposition to Summary Judgment (Doc. 41) four separate incidents that she claims were adverse. Two of these incidents cannot be considered adverse, however. Plaintiff's claim that she was not permitted to use her patrol vehicle to drive to school while off-duty clearly does not rise to the level of adverse employment action because nothing about this incident had any effect on her

incidents. It is undisputed by Defendant that Plaintiff belongs to a protected class and that she was qualified to do the job. (Doc. 31 at 6). Thus, parts 1 and 2 of the Maynard rubric are met and no further analysis is required.

i. Watch Relief Supervisor

Plaintiff alleges that she was treated differently than fellow male police officer Chris Eaves when he was given a Watch Relief Supervisor duty assignment on June 12, 2006, over Plaintiff. She further claims that the denial of the "promotion" to Watch Supervisor after Officer Eaves resigned was also adverse. (Doc. 41, p. 7) The title of Relief Supervisor is not a promotion in rank, but merely an additional duty assignment. Plaintiff admits that the position of Watch Relief Supervisor is not a position that includes a pay raise, but merely has some sort of prestige associated with it. (Doc. 41, pp. 6-7). Without performing a detailed analysis of the prestige associated with the Watch Relief Supervisor duty, I will assume that being passed over for this position is an adverse employment action. See Galloway, 182 F. App.x at

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employment status. Likewise, Plaintiff complains of her treatment during "the Talamentez matter,"but Defendant has shown that no formal discipline was taken, and thus, no adverse employment action was taken. (Doc. 28, ¶¶51-58). Furthermore, Plaintiff provides no comparator for her actions in the Talamentez matter, but instead points her finger at other officers who should have been disciplined for different misconduct. Such accusations are not permitted in establishing valid comparators. See Henry v. City of Tallahassee, 216 F. Supp. 2d 1299, 1316 (N.D. Fla. 2002).

880. It is undisputed that both times Plaintiff was passed over for the Watch Supervisor position that the position was given to a male officer. Thus, Plaintiff has made her prima facie case of discrimination under McDonnell Douglas.

Because Plaintiff has established a prima facie case for discrimination, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason for not giving Plaintiff the position. Defendant's reasons are straightforward: the two employees given the position were senior to Plaintiff. Corporal Chris Eaves was given the Relief Supervisor duty assignment on June 12, 2006, because he had more seniority than Plaintiff. (Doc. 56, ¶ 4). After Eaves resigned in October 2006, Sergeant Deegins was given the duty assignment because he outranked Plaintiff. Thus, Defendant has satisfied its "exceedingly light" burden.

Since Defendant has offered a legitimate, nondiscriminatory reason for its action, the burden shifts back to Plaintiff to show that the reason given was really pretext for discrimination. Plaintiff offers no such "head on" attack of Defendant's decision not to give her the position of Watch Supervisor. Instead, she merely claims that she had more "hands-on supervisor experience" because of Eaves' "behavior problems and personnel file" and that she "deserved the promotion" and had been told this by other employees. (Doc. 40, ¶23). The Eleventh Circuit has specifically held that "Title VII is not designed to

make federal courts sit as a super-personnel department that reexamines an entity's business decisions." Davis v. Town of Lake Park, 245 F.3d 1232, 1244 (11th Cir. 2001). As such, merely questioning the reasonableness of Defendant's actions is not enough. A defendant is allowed to make a poor personnel decision. Damon, 196 F.3d at 1361 (Courts are not concerned with whether an employment decision is prudent or fair, but only with whether it was motivated by unlawful animus). None of Plaintiff's complaints about why she did not receive the Watch Supervisor position call into question Defendant's nondiscriminatory reason for its action. Importantly, Plaintiff has provided no reason whatsoever for her complaint that Sergeant Deegins received the position over her. Plaintiff's inability to cast sufficient doubt on Defendant's proffered nondiscriminatory reasons means that Plaintiff's argument fails.

ii. IA Investigation and Subsequent Termination

Plaintiff alleges that the fact there was an IA investigation conducted of her was adverse employment action. To prove disparate treatment under violation of work rules, Plaintiff must show either that she did not violate the work rule or that she engaged in similar misconduct as her similarly situated male counterparts, but the discipline enforced against her was more severe. Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989)."[T]he quantity and quality of the comparator's

misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions . . . ." Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999); Burke-Fowler, 447 F.3d at 1323. The "nearly" identical standard for comparators requires the identification of at least one male officer who violated the exact same Department policies as Plaintiff. McCalister, 211 F. App.x at 886 (plaintiff who violated six policies failed to produce a similarly situated comparator who violated the exact same six policies). Employees who commit more or less serious violations are not similarly situated comparators. Bailey-Pittman v. Unisia of Georgia Corp., 2006 WL 871100 (M.D. Ga. 2006).

Plaintiff fails to identify any similarly situated male officer. The IA investigation of Plaintiff concluded that she had committed seven violations of Department policy. While Plaintiff provides a litany of other officers that she claims should have been investigated for alleged violations of Department policy, she does not provide any evidence that any of the officers violated the exact same policies as Plaintiff. Plaintiff does not even allege what Department policy the male officers were alleged to have violated, how many violations occurred, or what were the underlying facts. Furthermore, Plaintiff offers no evidence that any of the officers she complains of were ever reported up the chain of command as she was. It is undisputed that the Department cannot take formal personnel action if no complaint was filed or if supervisors were otherwise unaware of

disciplinary problems within their ranks. A plaintiff's allegations of unverified misconduct by other employees in an attempt to make those employees into comparators are insufficient to sway a court. Henry, 216 F. Supp 2d at 1316 ("[T]he Court's inquiry is limited to 'whether employees are similarly situated for purposes of establishing a prima facie case,' not whether Plaintiff can construct a situation in which they could conceivable be similarly situated. . . .") (quoting Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir. 1998)).

Plaintiff was investigated because a junior officer had reported threatening comments that Plaintiff had made to him. She was terminated because she violated seven Department policies, including multiple incidents of untruthfulness. Plaintiff eventually was allowed to resign after she admitted five violations of Department policies. Plaintiff has not identified any male officer who violated the same seven Department policies who received more favorable discipline than she did. Defendant, however, has produced evidence that the Department has internally investigated and terminated at least four male officers who were found to have lied.

When it comes to disciplining employees for honesty violations, Defendant is entitled to treat Plaintiff.s violation of its honesty policy as more severe than a violation of its other policies. Jones v. Bessemer Carraway Med. Ctr., 137 F.3d at 1311-12 ("Title VII does not take away an employer's right

to interpret its rules as it chooses, and to make determinations as it sees fit under those rules."). Importantly, the IA investigation that was initially begun against Plaintiff was later expanded to make inquiries into the actions of other officers, including a male. As a result of a finding of untruthfulness on the part of Officer Darrell Goodwin, he was terminated. Plaintiff complains that male Officer Chris Boyer was not terminated during the course of the IA investigation. However Boyer is not similarly situated because he confessed to lying during the IA investigation, thereby avoiding termination (though he was suspended for five days).

Because Plaintiff cannot produce any similarly situated comparators, she cannot make a prima facie case of discrimination with regards to the IA investigation. Even if Plaintiff had established a prima facie case, Defendant's legitimate, nondiscriminatory reasons are sound. The IA investigation was conducted in a routine manner in accordance with Department policies and procedures following the complaint lodged against Plaintiff. The IA investigation recommended termination based on seven violations of Department policy - five of which Defendant later admitted in her resignation.

Given Defendant's nondiscriminatory reasons for terminating Plaintiff, the burden is on Plaintiff to show that the reasons for termination are really pretext for discrimination. Plaintiff is unable establish pretext, however. In her attempt

to establish pretext, Plaintiff provides a laundry list of male employees who were not punished for various activities. Plaintiff states that these allegations alone are sufficient because pretext can be shown by inconsistent application of Department policies. Plaintiff fails to show that Department policies were ever inconsistently applied, however. Plaintiff provides no evidence that any of the alleged violations were ever reported and cannot establish that the male employees were similarly situated to her. Furthermore, Plaintiff herself fully admitted to violating five Department policies. Again, federal courts will not act as personnel departments and reexamine a defendant's business decisions. Davis, 245 F.3d at 1244. Additionally, "A plaintiff may not establish [pretext] merely by questioning the wisdom of the employer's reason." Osahar v. Postmaster Gen. of U. S. Postal Serv., 263 F. App.x 753, 762 (11th Cir. 2008).

B. Retaliation

Plaintiff alleges that Defendant retaliated against her in violation of Title VII for making a statutorily protected expression. According to Plaintiff, she "engaged in protected activity when she told [Major] Humphreys she would sue him so fast his head would spin if he did not stop touching her." (Doc. 41, p. 14). According to Plaintiff, this comment was made to Humphreys in January 2006 after he had "smacked Plaintiff on the rear end." (Doc. 40, ¶ 11). A prima facie case of retaliation requires Plaintiff to show that 1) she engaged in

statutorily protected expression; 2) she suffered an adverse employment action; and 3) there is some causal relation between the two events. Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1277 (11th Cir. 2008). An employee engages in a statutorily protected expression if she opposed a practice forbidden under Title VII, such as gender discrimination, or has made a charge, testified, assisted, or participated in a Title VII investigation, proceeding, or hearing. Duncan v. Madison County, 272 F. App.x 859, 863 (11th Cir. 2008). While Plaintiff claims that her off-hand comment to Major Humphreys is enough to constitute a statutorily protected expression, a closer examination of her comment makes it clear that it does not. Therefore, Plaintiff fails to meet the first element of the prima facie case.

Plaintiff's comment to Humphreys was not a statement that she intended to engage in statutorily protected activity. Plaintiff's statement was a conditional statement. What Plaintiff was really saying to Humphreys was that if he slapped her on the backside again, she would then engage in statutorily protected activity (file a lawsuit). Plaintiff has cited no authority that supports her assertion that this type of threatened potential lawsuit is protected expression. If the court were to accept Plaintiff's argument, employees could make themselves virtually immune from termination merely by threatening possible lawsuit. One can imagine a scenario where a newly-hired employee could tell her employer on the first day of work "if you do anything that I find discriminatory, I will

file a lawsuit." To Plaintiff, this would be enough to entitle the hypothetical employee to Title VII protection if she was ever terminated because the employer was on notice of a potential lawsuit. Such a scenario is clearly not what Congress intended when it adopted Title VII. No detailed analysis of the legislative history of Title VII is required to make that conclusion because to hold otherwise would be ludicrous. While it is true that employees do not speak with the clarity and precision of lawyers, under no set of circumstances would such a conditional comment indicate to an employer that Plaintiff was intending to engage in protected activity. On the contrary, Humphreys can reasonably be held to have understood that so long as he kept his hands to himself from then on that Plaintiff would not file a lawsuit (a protected activity).

Plaintiff also alleges that she engaged in protected activity when she told a co-worker, Sarah Butler, in June 2006 that she "was offended that the Department . . . was interfering with her life and . . . that she was tired of the supervisors not standing up to Major Humphreys because they were scared of the repercussions. She told Butler that her only alternative was to sue if they did not stop and leave her alone." (Doc. 40, ¶17). Shortly after this conversation, Butler told Humphreys about what Plaintiff had said to her. As with the prior statement made by Plaintiff, this statement is also a conditional statement. Her condition is explicit: leave me alone or I will sue. She did not say to Butler that she was going to sue. In fact,

Plaintiff admits that her intention in talking with Butler was "to find out if Butler would join her" in "hypothetical" lawsuit. (Doc. 40, ¶ 17). Such hypothetical scenarios and conditional threats do not indicate to an employer that Plaintiff was intending to engage in protected activity. Thus, they are not protected.

Even if I were to find that Plaintiff had established that she had made a statutorily protected statement, she still cannot make a prima facie case of retaliation because she cannot show causation. "If there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law." Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004). A "substantial delay" can be as little as three months. Drago v. Jenne, 435 F.3d 1301, 1308 (11th Cir. 2006).

Plaintiff claims several actions were taken in retaliation for her "protected activity." Most of the actions complained of are petty (that Humphreys refused to attend Plaintiff's wedding, for example) and cannot constitute adverse employment action. Of the potentially adverse actions, only two - not giving Plaintiff the role of Watch Supervisor and the IA investigation - rise to the level of adverse employment action. Neither of these actions was taken within an interval of time indicating causal connection to the alleged protected activity. The refusal to make Plaintiff Watch Supervisor occurred in June 2006 - five months after directly

threatening Humphreys and before Plaintiff told Butler of her plan to sue later in June. The IA investigation was opened in January 2007 - one year after she had threatened Humphreys and six months after talking with Butler. Such long gaps between protected activity and adverse employment action are insufficient to establish the causal relation prong in a retaliation case.

No matter how her claim is analyzed, Plaintiff cannot make a prima facie case of retaliation against Defendant.

C. Sexual Harassment

Sexual harassment was mentioned multiple times throughout the parties. filings, but sexual harassment is not alleged as a separate actionable count. Since Plaintiff has specifically stated that she is not proceeding on a claim of hostile work environment, I will not consider the allegations of sexual harassment because the issue is not now before me. However, I note that had the issue of sexual harassment been raised, Defendant would have successfully defended itself based on the Faragher-Ellerth affirmative defense. See Faragher v. City of Boca Raton, 524 U.S. 775, 807-8, 118 S.Ct. 2275, 2292-93 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 764-65, 118 U.S. S.Ct. 2257, 2270 (1998).

IV. CONCLUSION

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment (Doc. 27) is GRANTED.
2. The clerk is directed to enter judgment dismissing Plaintiff's claims with prejudice.
3. The clerk is directed to close the file.

ORDERED on April 20, 2009.

/S/ Richard Smoak

RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

ELEVENTH CIRCUIT DECISIONS APPLYING THE "NEARLY IDENTICAL" STANDARD

White v. Hall, 2010 WL 29977443 (11th Cir. 2010) (Title VII and section 1983; discriminatory termination claim)

Thomas v. Department of Corrections for the State of Georgia, 2010 WL 1753315 (11th Cir. 2010)(Title VII; discriminatory retaliation and termination claim)

Jiles v. United Parcel Service, Inc., 360 Fed.Appx 61 (11th Cir. 2010) (Florida Civil Rights Act; discriminatory retaliation claim)

Smith v. Sunbelt Rentals, Inc., 356 Fed.Appx 272 (11th Cir. 2009) (Title VII; discrimination in pay and assignment)

Escarra v. Regions Bank, 352 Fed.Appx 401 (11th Cir. 2009) (Florida Civil Rights Act; discriminatroy termination)

Bothelo v. Johanns, 353 Fed.Appx 295 (11th Cir. 2009) (Title VII; discriminatory discipline claim)

Foster v. Board of Regents of the University System of Georgia, 342 Fed.Appx 465 (11th Cir. 2009) (Title VII; discriminatory retaliation)

Johnson v. England, 350 Fed.Appx 314 (11th Cir. 2009) (Title VII; discriminatory promotion claim)

Roxbury-Smellie v. Florida Department of Corrections, 324 Fed.Appx 783 (11th Cir.) (Title VII; discriminatory termination claim)

Hawkins v. Potter, 316 Fed.Appx 957 (11th Cir. 2009) (Title VII and Americans with Disabilities Act; discriminatory treatment and retaliation)

Bennett v. Chatham County Sheriff Department, 315 Fed.Appx 152 (11th Cir 2008) (Title VII and section 1983; discriminatory retaliation and promotion claim)

Reeves v. Yeager, 298 Fed.Appx 878 (11th Cir. 2008) (Title VII; discriminatory termination claim)

Davis v. Houston County, Alabama Board of Education, 291 Fed.Appx 251 (11th Cir. 2008) (section 1983; discriminatory retaliation claim)

McCann v. Tillman, 526 F.3d 1370 (11th Cir. 2008)(sections 1981 and 1983; discriminatory discipline claim)

Howard v. Oregon Television, Inc., 2008 WL 1947094 (11th Cir. 2008) (Title VII; discriminatory discipline claim)

Wood v. K-Mart Corp., 2008 WL 942859 (11th Cir. 2008) (Title VII; discriminatory discipline claim)

Phillips v. Aaron Rents, Inc., 262 Fed.Appx. 202 (11th Cir. 2008) (Title VII and section 1981; discriminatory discipline claim)

Mathis v. Wachovia Bank, 255 Fed.Appx. 425 (11th Cir. 2007) (Title VII and section 1981; discriminatory discipline claims)

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Cuevas v. American Express Travel Related Services Co., Inc., 256 Fed.Appx. 241 (11th Cir. 2007) (Title VII; discriminatory discipline claim)

Sumerlin v. AmSouth Bank, 242 Fed.Appx. 687 (11th Cir. 2007) (Title VII and section 1981; salary discrimination claim)

Dawson v. Henry County Police Department, 238 Fed.Appx. 545 (11th Cir. 2007) (Title VII and sections 1981 and 1983; discriminatory demotion claim)

Robinson v. LaFarge North America, Inc., 240 Fed.Appx. 824 (11th Cir. 2007) (Title VII and section 1981; discriminatory demotion claim)

Clark v. Potter, 232 Fed.Appx. 895 (11th Cir. 2007) (Title VII; discriminatory discipline claim)

Wright v. Sanders Lead Co., Inc., 217 Fed.Appx. 925 (11th Cir. 2007) (Title VII; discriminatory discipline claim)

Bell v. Capital Veneer Works, 2007 WL 245875 (11th Cir. 2007) (Title VII, Age Discrimination in Employment Act and section 1981; discriminatory layoff claim)

McCalister v. Hillsborough County Sheriff, 211 Fed.Appx. 883 (11th Cir. 2006) (Title VII; discriminatory discipline claim)

Keith v. MGA, Inc., 211 Fed.Appx. 824 (11th Cir. 2006) (Title VII and section 1981; discriminatory dismissal claim)

Toney v. Montgomery Jobs Corps, 211 Fed.Appx. 816 (11th Cir. 2006) (Title VII; discriminatory dismissal claim)

Roland v. United States Postal Service, 200 Fed.Appx. 868 (11th Cir. 2006) (Title VII; discriminatory demotion claim)

Tomczyk v. Jocks & Jills Restaurants, LLC, 198 Fed.Appx. 804 (11th Cir. 2006) (Title VII and section 1981; discriminatory discipline claim)

Mack v. ST Mobile Aerospace Engineering, Inc., 195 Fed.Appx. 829 (11th Cir. 2006) (Title VII and section 1981; discriminatory demotion claim)

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Hammons v. George C. Wallace State Community College, 174 Fed.Appx. 459 (11th Cir. 2006) (Title VII; discriminatory refusal to renew contract)

Filius v. Potter, 176 Fed.Appx. 8 (11th Cir. 2006) (Title VII; discriminatory discipline claim)

Hendrix v. Snow, 170 Fed.Appx. 68 (11th Cir. 2006) (Title VII; discriminatory discharge claim)

Boykin v. Bank of America Corp., 162 Fed.Appx. 837 (11th Cir. 2005) (Fair Housing Act; discriminatory loan terms claim)

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Amos v. Tyson Foods, Inc., 153 Fed.Appx. 637 (11th Cir. 2005) (Title VII; discriminatory discipline claim)

McDonell v. Gonzales, 151 Fed.Appx. 780 (11th Cir. 2005) (Title VII)

Embry v. Callahan Eye Foundation Hospital, 147 Fed.Appx. 819 (11th Cir. 2005) (Title VII; discriminatory discipline claim)

Johnson v. Atlanta Independent School System, 137 Fed.Appx. 311 (11th Cir. 2005) (Title VII and Age Discrimination in Employment Act; discriminatory dismissal claim)

Moore v. Alabama Dept. of Corrections, 137 Fed.Appx. 235 (11th Cir. 2005) (Title VII and section 1983; discriminatory discipline claim)

Cooley v. Great Southern Wood Preserving, 138 Fed.Appx. 149 (11th Cir. 2005) (Title VII; discriminatory discipline claim)

Morris v. Emory Clinic, Inc., 402 F.3d 1076 (11th Cir. 2005) (Age Discrimination in Employment Act; discriminatory discharge claim)

Wilson v. B/E Aerospace, Inc., 376 F.3d 1079 (11th Cir. 2004) (Title VII; discriminatory discharge claim)

Maynard v. Board of Regents of the Division of Universities of the Florida Dept. of Ed., 342 F.3d 1281(11th Cir. 2003) (Title VII; termination from residence program)

Williams v. Motorola, Inc., 330 F.3d 1284 (11th Cir. 2002) (Title VII; claim of discrimination in pay, assignments, and termination)

Silvera v. Orange County School Bd., 244 F.3d 1253 (11th Cir. 2001) (Title VII; discriminatory termination claim)

Maniccia v. Brown, 171 F.3d 1264 (11th Cir. 1999) (Title VII; discriminatory termination claim)

Hawkins v. Ceco Corp., 883 F.2d 977 (11th Cir. 1989) (Title VII and section 1981; discriminatory dismissal claim)

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984) (Title VII; discriminatory dismissal claim)

Davin v. Delta Air Lines, Inc., 678 F.2d 567 (5th Cir. Div. A 1982) (Title VII; discriminatory dismissal claim)

ELEVENTH CIRCUIT DECISIONS REQUIRING SIMILARLY SITUATED COMPARATOR TO ESTABLISH A PRIMA FACIE CASE JANUARY 1, 2009 THROUGH DECEMBER 31, 2009

Thompson v. Carrier Corp., 358 Fed.Appx. 109, 112-3 (11th Cir. 2009)

Daniels v. Hale, 350 Fed.Appx. 380, 385 (11th Cir. 2009)

McMillian v. Fulton County Government, 349 Fed.Appx. 440,442 (11th Cir. 2009)

Hill v. Emory University, 346 Fed.Appx. 390,394 (11th Cir. 2009)

White v. Florida Department of Highway Safety and Motor Vehicles, 343 Fed.Appx. 532, 534 (11th Cir. 2009)

Hanford v. Geo Group, Inc., 345 Fed.Appx. 399, 403-5 (11th Cir. 2009)

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McNeal v. City of Tarrant, 325 Fed.Appx. 794, 796 (11th Cir. 2009)

Keeler v. Florida Department of Health, 324 Fed.Appx. 850, 854 (11th Cir. 2009)

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No. 10-471

Supreme Court, U.S.
FILED
NOV 15 2010

In The

Supreme Court of the United States

TONYA MILLER-GOODWIN,

Petitioner,

v.

CITY OF PANAMA CITY BEACH, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit's application of its "nearly identical" standard for considering the similitude of comparators in this discrimination case comports with the Supreme Court's comparator jurisprudence.

PARTIES

The petitioner is Tonya Miller-Goodwin. She is referred to throughout as "Goodwin."

The respondent is the City of Panama City Beach, Florida, hereinafter "the City."

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OPINIONS BELOW

Pursuant to Rule 24.2, the City accepts Goodwin's statement of opinions below.

STATEMENT OF JURISDICTION

Pursuant to Rule 24.2, the City accepts Goodwin's statement of jurisdiction.

STATUTES INVOLVED

Pursuant to Rule 24.2, the City accepts Goodwin's statement of the statutes involved.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Tonya Miller-Goodwin ("Goodwin"), is a former police officer of the City of Panama City Beach, Florida ("the City") Police Department. [R.28,¶¶2-5; App.20a-21a].[1] She commenced this action in June 2008, by filing a complaint alleging the City unlawfully discriminated and retaliated against her on the

[1] Record citations ("R.__") are to the document numbers utilized by the District Court's Case Management/Electronic Case Filing System. Citations to the Petition are so designated and citations to the appendix appear as "App.___."

basis of her gender[2] in violation of 42 U.S.C. § 2000e, *et seq.*[3] [R.1]. The District Court entered summary judgment in favor of the City and against Goodwin on both claims on April 20, 2009. [App.19a-40a].

Goodwin does not contest the judgment on her retaliation claim; nor does Goodwin contest the District Court's finding that only two of her allegations (the denial of a desired "promotion" and her ultimate termination) constituted adverse employment actions as required under Title VII. [App.28a].

With respect to the adverse employment actions, the District Court found, or assumed, that Goodwin satisfied her initial evidentiary burden of establishing a *prima facie* case of discrimination by showing that similarly situated males received more favorable

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[2] Goodwin also alleged unlawful discrimination and retaliation on the basis of age in violation of 29 U.S.C. § 629, *et seq.* and brought both gender and age claims under the Florida Civil Rights Act ("FCRA"), Chapter 760, *Florida Statutes*. Goodwin voluntarily dismissed these claims with prejudice on July 28, 2008. [R.3]. Goodwin also abandoned her hostile environment sexual harassment claims in response to the City's Motion for Summary Judgment. [R.41, p.2].

[3] The District Court had subject matter jurisdiction over Petitioner's Title VII claim pursuant to 42 U.S.C. § 2000e-5(f)(3), as well as federal question jurisdiction pursuant to 28 U.S.C. § 1331. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The Circuit Court had jurisdiction pursuant to 28 U.S.C. § 1291 in the appeal from a final summary judgment rendered by the District Court.

treatment. [App.30a,34a]. The District Court also found, however, that the City's legitimate, non-discriminatory business reasons were "sound" and that Goodwin had failed to adduce any evidence to establish pretext for unlawful discrimination. [App.30a,34a,35a]. The District Court's decision did not rely solely on Goodwin's inability to establish a "nearly identical" male comparator.

On *de novo* review, the Eleventh Circuit Court of Appeals affirmed the District Court's grant of summary judgment [App.18a], again finding only two adverse employment actions. [App.10a]. In its rejection of Goodwin's discriminatory promotion claim, the Eleventh Circuit found (1) Goodwin failed to establish a *prima facie* case because she "failed to show that she and the male officer who was promoted . . . were similarly situated," [App.10a]; (2) the City articulated legitimate, non-discriminatory reasons for its actions thereby satisfying the second phase of the *McDonnell Douglas* burden-shifting framework [App.11a]; and (3) Goodwin failed to present any evidence of pretext. [App.11a].

In its rejection of Goodwin's discriminatory discipline claim, the Eleventh Circuit stopped its analysis at the *prima facie* case stage of the *McDonnell Douglas* framework [App.11a,12a], finding Goodwin "did not show that other male employees of the Department engaged in misconduct that was *nearly identical* to hers, but were treated more favorably." [App.13a, emphasis added]. Goodwin now challenges both the Eleventh Circuit's use of the

"nearly identical" standard as well as its placement of the standard at the *prima facie* stage. Determination of these issues, however, will have no effect on Goodwin's case. As the District Court determined, she could not survive summary judgment under any circumstances. [App.33a].

B. Statement of Facts

Goodwin's statement of the case (i.e. facts) in her Petition includes twenty-four (24) citations to the record below – many of which are supported only by her own affidavit filed in response to the City's Motion for Summary Judgment. Goodwin's affidavit is full of conclusory assertions for which Goodwin had no foundation, no personal knowledge, and no evidence. Virtually all of the "comparator" evidence relied on by Goodwin stems from this affidavit. The City timely moved to strike much of the affidavit but the District Court granted summary judgment without addressing the Motion to Strike. The City continues to take great exception to any statement of "fact" which is derived from Goodwin's self-serving affidavit or other documents which it moved to strike.

Goodwin was a female law enforcement officer for the City's Police Department ("the Department") from January 2002 until her resignation in February 2007.

[R.28,¶¶2-5; App.20a-21a].[4] Goodwin's resignation followed an Internal Affairs ("I.A.") investigation which concluded that she violated seven separate Department policies and procedures including lying during the I.A. investigation. [App.21a,33a]. Goodwin fully admitted to five of these violations in her resignation. [App.21a,35a].

The investigation in question centered on a new male recruit's complaint that Goodwin directed an inappropriate remark at him. [R.28,¶19-25]. When a routine shift level investigation of the matter indicated that someone was lying – a much more serious offense – the Chief initiated a formal I.A. investigation to determine the truth. The investigation was expanded to include a male officer and a female officer whom the Department also suspected of lying.

A total of thirty-seven (37) employees were interviewed during the investigation and Goodwin encouraged the Department to interview more. [R.30-14,¶21]. The I.A. investigation concluded that Goodwin and two other officers were guilty of policy violations – including lying during the investigation – and

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[4] Goodwin was initially terminated from the Department. Although she appealed her termination to the City's Civil Service Board, she cut this process short by negotiating her retroactive resignation. [R.30-7,¶30; R.38-65 and 38-66].

all three (one male and two females) were terminated. [App.21a; R.30-7,¶32].[5]

There have been multiple I.A. investigations at the Department through the years – many involving multiple witnesses – and there was nothing unusual about this particular investigation. [R.30-14,¶¶22, 28]. The Department had previously internally investigated five male officers who were found to have lied. All of these male officers were terminated or resigned in lieu of termination. [R.30-7,¶40].

With respect to Goodwin, the investigation determined that she had violated seven separate Department policies, including:

i. Article I – Conduct Unbecoming an Officer – Section 04: Knowingly and willfully making a false report or entry into Department records.

ii. Article I – Conduct Unbecoming an Officer – Section 15: Repeated violations of Department rules and regulations; or any other course of conduct indicating that a member has little or no regard for his (her) responsibility as a member of the Police Department.

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[5] Another male officer was also found to be untruthful during the investigation; however, he ultimately admitted his error, cooperated, and told the truth. He thus received only a five day suspension. [R.30-7,¶32].

iii. Article I – Conduct Unbecoming an Officer – Section 18: Engaging in any conduct which constitutes conduct unbecoming an officer not listed above, or any act, which is likely to adversely affect the discipline, good order, or reputation of the department.

iv. Article IV – Neglect of Duty – Section 05: Failure to properly supervise subordinates; or to refer disciplinary charges, or to take other appropriate disciplinary action.

v. Article IV – Neglect of Duty – Section 06: Failure to comply with orders, directives, regulations, etc., oral or written.

vi. Article IV – Neglect of Duty – Section 12: Failure to properly patrol zone, unauthorized absence from assignment, failure to respond to radio call; idle conversation or loafing.

vii. Article IV – Neglect of Duty – Section 13: Improper use of radio and established communications procedures.

[R.30-7,¶28].

Goodwin also complained that she did not receive an appointment to a desirable duty assignment. [R.41,pp.6-7]. The duty assignment (characterized by Goodwin as a "promotion") was not a promotion in rank and had no associated increase in pay or benefits. [App.29a; R.28,¶60]. The position was given to

Sergeant Deegins in October 2006 because he outranked Corporal Goodwin. [App.10a,30a].

REASONS FOR DENYING THE WRIT

The answer to the question presented by Goodwin is a resounding "no." A *prima facie* case of intentional discrimination does not require a judicial finding that the defendant gave more favorable treatment to a "nearly identical" comparator, and the Eleventh Circuit's opinion in Goodwin does not so hold.

The answer to the question presented by the City is an equally emphatic "yes." The Eleventh Circuit's analysis of Goodwin's comparator evidence is wholly consistent with the requirements of this Court and with the analytical framework of other circuits.

Goodwin's argument for *certiorari* focuses on the Eleventh Circuit's "nearly identical" standard and labels the Eleventh Circuit as a virtual lone wolf, imposing a standard both impossible to meet and unknown to any other federal appellate circuit. This argument rests on the fundamentally flawed premise that the Eleventh Circuit requires proof of a similarly situated comparator to establish a *prima facie* case of discrimination. It does not.

Goodwin overlooks well established and controlling case law holding that a plaintiff establishes a *prima facie* case by showing *either* (1) a similarly

situated person receiving more favorable treatment, *or* (2) some "other evidence" giving rise to an inference of discrimination. Goodwin further overlooks the District Court's assumption that she met the Eleventh Circuit's "nearly identical" standard and satisfied her *prima facie* case. Notwithstanding this assumption, Goodwin failed to show that the City's legitimate, nondiscriminatory reasons for its actions were a mere pretext for discrimination as required by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

I. A COMPARATOR IS NOT REQUIRED TO PROVE A *PRIMA FACIE* CASE OF DISCRIMINATION.

Goodwin first contends that the Eleventh Circuit unreasonably requires *any prima facie* case of discrimination to include proof of a similarly situated comparator. [Petition,p.11]. There is no such requirement.

Eleventh Circuit case law provides that, "[w]here evidence of similarly situated employees is unavailable, the plaintiff is required to produce other circumstantial evidence of discrimination to establish her *prima facie* case of disparate treatment." *Roxbury-Smellie v. Fla. Dep't of Corr.*, 324 F. App'x 783, 786 (11th Cir. 2009) (emphasis added). Proof of a similarly situated comparator is thus just one of two methods of proof available to Title VII plaintiffs.

> This either/or approach recognizes that:
>
> [i]t is not always possible to find suitable comparators and we have noted that "if a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present."

Lee v. Mid-State Land & Timber Co., 285 F. App'x 601, 606 (11th Cir. 2008) (quoting *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1277 (11th Cir. 2008)).[6] *See also McCann v. Tillman*, 526 F.3d 1370, 1374, n.4 (11th Cir. 2008) (recognizing that even in the absence of a comparator, some conduct may be so unfairly discriminatory that no reasonable person would find it non-actionable).

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[6] More than one formulation of the elements of a *prima facie* case exist. The Court in *McDonnell Douglas* recognized this when it articulated four elements for a *prima facie* case but stated that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required . . . is not necessarily applicable in every respect to differing factual situations." Appellees correctly argue that one way of establishing a *prima facie* case of employment discrimination [ ] requires the plaintiff to show that . . . [his misconduct] was the same or similar misconduct to that which a similarly situated employee engaged in, but was not similarly disciplined for.

Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1275 (11th Cir. 2008) (Internal citations omitted).

In *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079 (11th Cir. 2004), for example, the Eleventh Circuit found that the plaintiff "failed to identify any male employee who was similarly situated and treated more favorably than she was treated." Nonetheless, the court stressed that "[the plaintiff's] failure to identify a comparator does not end the analysis of her termination claim [because] summary judgment is appropriate [only] *where no other evidence of discrimination is present*." *Id.* at 1092 (emphasis in original).[7]

In *Sumerlin v. AmSouth Bank*, 242 F. App'x 687 (11th Cir. 2007), the Eleventh Circuit expressly recognized that a plaintiff need not even try to offer a similarly situated comparator to make a Title VII disparate treatment claim. The *Sumerlin* court asked only if the plaintiff's evidence gave rise to "an inference of discrimination." *Id.* at 690.

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[7] *See also Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1325 (11th Cir. 2006) ("[b]ecause [the plaintiff] failed to establish valid comparators *and presented no other circumstantial evidence suggesting racial discrimination*, [she] did not establish a *prima facie* case of race discrimination.") (emphasis added); *Wright v. Sanders Lead Co.*, 217 F. App'x 925, 929 (11th Cir. 2007) (Plaintiff "failed to establish valid comparators and presented no other circumstantial evidence suggesting racial discrimination."); and *Davis v. Mgmt. Tech.*, 193 F. App'x 872, 874 (11th Cir. 2006) (plaintiff "failed to assert the existence of a *prima facie* case in the district court, *either* by successfully demonstrating disparate treatment as compared to a similarly situated employee *or otherwise*.") (emphasis added).

The Eleventh Circuit has repeatedly confirmed that summary judgment is appropriate only when "*no other evidence of discrimination is present*" – doing so no less than three times this very year. *Thomas v. Dep't of Corr. for Ga.*, 377 F. App'x 873, 879 (11th Cir. 2010); *Coar v. Pemco Aeroplex, Inc.*, 372 F. App'x 1, 4 (11th Cir. 2010); *Muhammad v. Audio Visual Servs. Group*, 380 F. App'x 864, 871 (11th Cir. 2010).[8] Contrary to Goodwin's claim that in the Eleventh Circuit a plaintiff's claim fails as a matter of law without a similarly situated comparator [Petition,p.11], the law in the Eleventh Circuit is clear that a plaintiff may offer either a similarly situated comparator, or some other evidence creating an inference of discrimination to establish her *prima facie* case. Goodwin chose the option of proving her claim of discrimination through comparators which she offered as similarly situated. She was not required to do so.

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[8] Cases applying this either/or approach go back much further. *See, e.g., Gresham v. City of Florence, Ala.*, 319 F. App'x 857, 864 (11th Cir. 2009); *Thomas v. Miami Veterans Med. Ctr.*, 290 F. App'x 317, 319 (11th Cir. 2008); *Gupta v. Walt Disney World Co.*, 256 F. App'x 279, 282 (11th Cir. 2007); *Austin v. City of Montgomery*, 196 F. App'x 747, 750 (11th Cir. 2006); *Roy v. Broward Sheriff's Office*, 160 F. App'x 873, 875 (11th Cir. 2005); *Martin v. Rumsfeld*, 137 F. App'x 324, 326 (11th Cir. 2005); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997).

II. THE "NEARLY IDENTICAL" STANDARD IS IN ACCORD WITH THIS COURT AND WITH OTHER CIRCUITS.

Goodwin next challenges the Eleventh Circuit's use of the term "nearly identical" when describing the degree of similitude required between the misconduct of the proffered comparator and the misconduct of the plaintiff.

When a plaintiff chooses to prosecute her case by showing a similarly situated employee, the Eleventh Circuit requires that any alleged comparator be "*similarly situated in all relevant respects.*" *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004); *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316-19 (11th Cir. 2003); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997). When the issue is misconduct, the Eleventh Circuit advises:

> In determining whether employees are similarly situated for purposes of establishing a *prima facie* case, it is necessary to consider whether the employees are involved in or accused of *the same or similar conduct* and are disciplined in different ways. . . . We require that the *quantity and quality* of the comparators' misconduct be *nearly identical* to prevent courts from second-guessing employers'

> reasonable decisions and confusing apples and oranges.

Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999) (internal citations omitted) (emphasis added.)[9]

Goodwin contends that "nearly identical" means "identical" in the Eleventh Circuit,[10] a requirement which is too "exacting," is "virtually impossible to meet," and is in conflict with every other circuit[11] and with this Court. [Petition,pp.9,10,18,19]. Goodwin's reliance on the fact that not all circuits use the same words to describe the required legal analysis allows her to raise the appearance of a significant circuit split where, in law and fact, none exists. [Petition,pp.23-24].

All circuits agree that when a plaintiff chooses to prove her case through the use of a comparator,[12] the

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[9] This requirement is not new. *See, e.g., Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181 (11th Cir. 1984) (Relying on *Davin v. Delta Airlines, Inc.,* 678 F.2d 567 (11th Cir. 1982) and other earlier 5th Circuit cases) ("[A] plaintiff fired for misconduct makes out a *prima facie* case of discriminatory discharge if he shows . . . 'that the misconduct for which [he] was discharged was nearly identical to that engaged in by [an employee outside the protected class] whom [the employer] retained.' ").

[10] "Any distinction between 'nearly identical' and 'identical' in Eleventh Circuit cases exists only in theory." [Petition,p.39].

[11] In some places Goodwin indicates the standard conflicts only with six other circuits. [Petition,p.10]

[12] *First Circuit*: *Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir. 1997) (*prima facie* case requires proof of a comparator

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"similarly situated in all relevant aspects."). *Second Circuit*: *Davey v. Jones*, 371 F. App'x 146, 148 (2d Cir. 2010) (*prima facie* case requires circumstances giving rise to an "inference of discrimination"); *Beauchat v. Mineta*, 257 F. App'x 463, 465 (2d Cir. 2007) (*prima facie* case requires proof of "similarly situated" comparator). *Third Circuit*: *Vernon v. A & L Motors*, 2010 WL 2089640, at *2 (3d Cir. 2010) (*prima facie* case requires circumstances giving rise to an "inference of unlawful discrimination"); *Williams v. N.J. Trenton Psychiatric Hosp.*, 2009 WL 405640 (3d Cir. 2009) (*prima facie* case requires proof of "similarly situated" comparator). *Fourth Circuit*: *Mackey v. Shalala*, 360 F.3d 463, 468 (4th Cir. 2004) (*prima facie* case requires circumstances giving rise to an "inference of unlawful discrimination."); *Cottman v. Rubin*, 35 F. App'x 53, 55 (4th Cir. 2002) (*prima facie* case requires proof of "similarly situated" comparator). *Fifth Circuit*: *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009) (*prima facie* case requires proof of "similarly situated" comparator). *Sixth Circuit*: *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir. 2002) (*prima facie* case requires proof of "similarly situated" comparator). *Seventh Circuit*: *Atanus v. Perry*, 520 F.3d 662, 672 (7th Cir. 2008) (*prima facie* case requires proof of "similarly situated" comparator); *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1090 (7th Cir. 2000) (*prima facie* case requires circumstances giving rise to an "inference of discrimination"). *Eighth Circuit*: *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2008) (*prima facie* case requires proof of "similarly situated" comparator); *Arnold v. Nursing and Rehabilitation Center at Good Sheppard, LLC*, 471 F.3d 843, 846 (8th Cir. 2006) (*prima facie* case requires circumstances giving rise to an "inference of discrimination"). *Ninth Circuit*: *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 743 (9th Cir. 2004) (*prima facie* case requires either "similarly situated" comparator or circumstances giving rise to an "inference of discrimination."). *Tenth Circuit*: *Robinson v. Dean Foods Co.*, 654 F.3d 1268, 1276 (10th Cir. 2009) (*prima facie* case requires circumstances giving rise to an inference of discrimination). *Eleventh Circuit*: *Roxbury-Smellie v. Fla. Dep't of Corr.*, 324 F. App'x 783, 786 (11th Cir. 2009) (*prima facie* case requires proof of a "similarly situated" comparator or "other evidence" giving rise to an inference of

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comparator must be "similarly situated."[13] All circuits further agree that the quantity and quality of the misconduct must at the very least be comparable. "Ten circuits," Goodwin argues, "have rejected this avowedly stringent [nearly identical] standard," six circuits utilizing a "demonstrably different" and "manifestly less restrictive" standard and four other circuits utilizing only a "comparable seriousness" standard. [Petition,p.23]. Regardless of the word labels used, all courts are engaging in the same analysis: considering the totality of the circumstances

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discrimination). *D.C. Circuit*: *Czekalski v. LaHood*, 589 F.3d 449 (D.C. Cir. 2009) (*prima facie* case requires evidence giving rise to an inference of discrimination).

[13] The origin of the phrase "similarly situated" in the Eleventh Circuit dates back to *Baldwin v. Birmingham Bd. of Ed.*, 648 F.2d 950 (5th Cir. 1981), which relied on decisions of this Court:

> We held in *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977), a Title VII disparate treatment case, that the discharge of the black plaintiff and the retention of another white employee under apparently similar circumstances stated a *prima facie* case. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280-85, 96 S.Ct. 2574, 2578-81, 49 L.Ed.2d 493 (1976). Such a showing, which is essentially the four-part *prima facie* case set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), as applied to wrongful discharge cases, raises the inference, in the absence of explanation, that the defendant's actions were based on discriminatory motivation. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978); *Ramirez v. Sloss*, 615 F.2d at 168-69.

to determine whether the conduct is sufficiently similar to create an inference of discrimination.

By way of example, in the "manifestly less restrictive" category, Goodwin cites *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845 (8th Cir. 2005), as following a "low threshold" standard for determining whether employees are similarly situated at the *prima facie* case stage and a "rigorous" test at the pretext stage. [Petition,pp.28-29]. *Rodgers,* 417 F.3d at 852, 853. The standards imposed by the Eighth Circuit, however, are in line with the Eleventh Circuit. At the *prima facie* case stage, a plaintiff must prove that she and a comparator were "involved in or accused of the same or similar conduct and were disciplined in different ways." *Rodgers,* 417 F.3d at 852 (emphasis added).

Compare the underlined verbage above with the Eleventh Circuit's almost verbatim language in Goodwin: "When a plaintiff alleges discriminatory discipline, to determine whether employees are similarly situated, we evaluate 'whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.'" (quoting *Burke-Fowler v. Orange Cnty., Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006)). [App.11a]. The Eighth and Eleventh Circuits are performing the same legal analysis, and use the same language in doing so.

At the pretext stage, the Eighth Circuit requires a plaintiff to prove that "employees outside of her protected group were similarly situated in all relevant respects" and that their misconduct was of

"comparable seriousness." *Rodgers,* 417 F.3d at 853. Once again, compare this pronouncement with the Eleventh Circuit's observation in Goodwin's case: "[T]he 'comparator must be similarly situated in all relevant respects' and 'nearly identical' to the plaintiff." [App.10a].

In *Rodgers*, the Eighth Circuit found that although the plaintiff and her alleged comparator violated the same policy, "the frequency and seriousness of [the plaintiff's] violations . . . set her apart." *Rodgers,* 417 F.3d at 853-854. This is the exact same analysis undertaken by the Eleventh Circuit in looking at the "quantity and quality" of the misconduct. [App.10a (noting *Burke-Fowler* standard)]. The only distinction between the two standards is in the phraseology: "comparable seriousness" and "nearly identical." It is a distinction without a difference. The application of the standard is the same. The outcome for Goodwin would have been the same in the Eighth Circuit.

Amongst Goodwin's group of "comparable seriousness" courts is the Seventh Circuit. Contrary to Goodwin's argument, it too is in harmony with the Eleventh Circuit.

Peirick v. Indiana University-Purdue University Indianapolis Athletics Department, 510 F.3d 681 (7th Cir. 2007) [Petition,p.24,n.12, and p.26,n.15], involved an allegedly discriminatory termination of the women's tennis coach. In conducting its *de novo* review of the district court's granting of summary judgment,

the Seventh Circuit undertook an extensive analysis to determine whether the plaintiff's three proffered comparators (other male coaches) were similarly situated. "To assess whether two employees are similarly situated, 'a court must look at all relevant factors, the number of which depends on the context of the case.'" *Peirick*, 510 F.3d at 688. The *Peirick* court specified that the plaintiff must typically show she was "similarly situated with respect to performance, qualifications, and conduct" but, like the Eleventh Circuit, noted that its requirement should not be inflexible. *Id.*

In its examination of the three comparators, the Seventh Circuit found one not to be an adequate comparator, noting that although he had NCAA rule violations and his evaluation noted areas for improvement, these concerns were minor in comparison to the plaintiff's. The court found two other coaches to be valid comparators. These coaches had no difference in job duties from the plaintiff. And, like the plaintiff, both of these coaches engaged in serious violations of the University's principles of conduct and both had received complaints of and were disciplined for verbal abuse. *Peirick*, 510 F.3d at 690-691.

Although it is impossible to know how the Eleventh Circuit (or any other circuit) would rule in this case if presented, the analysis for the Eleventh Circuit would be the same: "[T]he 'comparator must be similarly situated in all relevant respects' and 'nearly identical' to the plaintiff."

Whether this analysis is termed "comparable seriousness" or "nearly identical," both courts are engaging in the same activity. The Eleventh Circuit carefully considers on a case by case basis whether the comparators are similar in all relevant respects.

In *Wright v. Sanders Lead Co.*, 217 F. App'x 925, 929 (11th Cir. 2007), the Eleventh Circuit provided an analysis of the "nearly identical" standard in its typical context:

> [T]he district court properly surmised, [that] Wright failed to establish that he and Whitman were "similarly situated in all relevant respects." *Jones*, 137 F.3d at 1311. First, the two employees did not engage in similar acts of misconduct. The evidence suggests that Whitman was fired for smoking on company premises, whereas Wright was fired because he asked a guard not to report his employee for a rule violation. Whitman, a laborer, committed a breach of safety, but Wright, a supervisor, committed a breach of trust. The acts of misconduct for which the two men were disciplined were substantially different. We have stated that the comparator's misconduct must "be nearly identical [to the plaintiff's] to prevent courts from second-guessing employer's reasonable decisions and confusing apples with oranges." *Burke-Fowler*, 447 F.3d at 1323 (citation omitted); *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) (same). Similarly, here, comparing Wright's transgression (covering up wrongdoing) with Whitman's

> (smoking) is akin to comparing apples with oranges.

Wright, 217 F. App'x at 929.

Goodwin provides a list of 48 Eleventh Circuit employment discrimination cases applying the "nearly identical" standard for which she boldly states: "no plaintiff has ever been able to meet that standard." [Petition,pp.9-10,n.2, and App.41a]. However, the cases cited by Goodwin do not demonstrate that this standard has not been and can never be met. A competent analysis of just a few of the cases cited shows that Goodwin's examination is superficial at best and fails to consider the case as a whole.

For example, the second case on Goodwin's list [App.41a] is *Thomas v. Department of Corrections for Ga.*, 377 F. App'x 873, 880 (11th Cir. 2010). Goodwin is correct that the Eleventh Circuit found no error in the district court's determination that the plaintiff did not show a comparator sufficiently similarly situated so as to create an inference of discrimination. Nonetheless, before reaching this conclusion, the Eleventh Circuit analyzed the conduct finding that although similar (falsification of timesheets), there were material differences between the two. *Thomas*, 377 F. App'x at 880. The court then gave the plaintiff the benefit of any doubt and assumed that he *did* show a similarly situated comparator. The plaintiff's case ultimately failed, not because of an inability to show a proper comparator but because the comparator was not treated better, the plaintiff was.

Accordingly, there could be no inference of discrimination. *Thomas*, 377 F. App'x at 880.

Similarly, in *Jiles v. United Parcel Service, Inc.*, 360 F. App'x 61 (11th Cir. 2010), Goodwin is correct that the Eleventh Circuit affirmed the district court's determination that the plaintiff did not show a similarly situated comparator. However, the court's analysis clearly revealed the deficiency in the plaintiff's presentation of evidence. Although the plaintiff alleged he and another employee had similar employment agreements, he failed to show that both were "similarly situated in all relevant respects." *Jiles*, 360 F. App'x at 65. Most critically, he did not show that the comparator had even been accused of dishonesty much less that he was disciplined any differently than the plaintiff so as to create an inference of discrimination. *Id.*

Yet another example of Goodwin's specious argument and superficial analysis is seen in *Foster v. Board of Regents of University System of Ga.*, 342 F. App'x 465 (11th Cir. 2009), wherein the district court "assumed *arguendo* that [the plaintiff] made out a *prima facie* case on this claim, and [the defendant did] not take issue with that assumption on appeal." Although the court ruled against the plaintiff on other grounds, it assumed that he fully satisfied his *prima facie* case, i.e. that he met the nearly identical standard. *Foster*, 342 F. App'x at 468.

These few examples expose the absence of the meaningful and detailed analysis needed before leaping to Goodwin's conclusion that no plaintiff has ever met the "nearly identical" standard. Presumably, Goodwin is looking only at a subclass of cases – those where the plaintiff appealed the entry of summary judgment against him on the nearly identical standard. Yet she offers no information as to the total number of cases filed or the specifics of each appeal. "Statistics without any analytical foundation are 'virtually meaningless.'" *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1089 (11th Cir. 2004) (citing *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 963 (11th Cir. 1997) (quoting *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 952-53 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058, 112 S.Ct. 935 (1992)).

Notably missing from Goodwin's argument is a case specifically requiring the "exact same" misconduct. Cases requiring such a strict comparison do not exist in the Eleventh Circuit.

Goodwin characterizes *McCalister v. Hillsborough County Sheriff*, 211 F. App'x 883, 886 (11th Cir. 2006), as holding "that a plaintiff fired for violating six policies must produce a comparator who violated the exact same six policies without being fired." [Petition,p.21]. This was not the case.[14]

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[14] The City identifies only two other cases which, at first glance, could be mistakenly interpreted as requiring the exact

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It is true that the *McCalister* court determined that the plaintiff failed to identify "a comparator who engaged in a quantity and quality of misconduct similar to his." *Id.* at 885. It is also true that in reaching this conclusion, the court considered that none of the proffered comparators broke all six of the same rules. *Id.* at 886. But the Eleventh Circuit did not stop its analysis with the number of violations. The court also reviewed the conduct of a proffered employee alleged to have also committed McCalister's

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same number of violations. However, a closer reading shows that they do not.

In *Moore v. Alabama Department of Corrections*, 137 F. App'x 235 (11th Cir. 2005), the court noted that while the plaintiff was "found guilty of five separate regulatory violations, [the comparator] was disciplined for only a single violation." The court, however, did not base its conclusion on this fact alone. Instead, the court considered "all the facts together," including that the employees: (1) had different ranks, (2) had different supervisors, and (3) engaged in different misconduct. *Id.* at 239. Only in light of the totality of the circumstances did the court find that the alleged comparator was insufficient.

In *Toney v. Montgomery Jobs Corps*, 211 F. App'x 816 (11th Cir. 2006), the court found that the plaintiff and his alleged comparators were not similarly situated where they engaged in some, but not all, of the misconduct the plaintiff had committed. Discussing the exact nature of the offenses engaged in by all the parties, the court determined that the "quantity and quality" of the misconduct was comparable. It was not that the alleged comparators did not engage in the exact same misconduct, but rather that the plaintiff had engaged in more than twice as many instances of misconduct as his alleged comparators. Under these circumstances, the court found that other employees were not sufficient comparators.

most serious violation – leaving an off-duty assignment. In doing so, the court found that the other employee's conduct (failing to report for duty because of a motor vehicle accident) was not of the same *quality* as the plaintiff's (departing one's post mid-shift for a tryst, leaving military personnel and property unguarded, lying to another officer, and submitting a false document).[15] *Id.* at 886. The Court's consideration of anything less than all six of the same rules clearly evinces that it did *not* require exactitude.

Goodwin contends that in her case, the Eleventh Circuit followed *McCalister* and moved beyond "nearly identical" to "identical" by requiring Goodwin to produce a male comparator who violated the exact same seven rules. [Petition,p.21]. While it is true that the Eleventh Circuit looked at quantity, like *McCalister*, it did not end its analysis there.

> Although the comparators identified by Goodwin arguably violated some of the Department's Rules and Regulations, . . . there has been no showing that any of them violated all of the Rules and Regulations that resulted in her termination [i.e., quantity] **or**

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[15] The court also reviewed the conduct of another employee who was charged with three of the same six offenses. Although it did observe the lesser quantity of misconduct (three offenses, not six), more importantly, the Court also determined that the quality of offenses were not equivalent (falsification of documents v. mid-shift frolic and endangerment of unguarded personnel and property). *Id.* at 886.

> that their alleged misconduct was nearly identical to hers [i.e., quality].

[App.14a,15a (emphasis added)]. In considering Goodwin's claim, the Eleventh Circuit did not require exact identity between the misconduct of Goodwin and her proffered comparators.

Eleventh Circuit opinions demonstrate that the "nearly identical" standard is not the *per se* rule that Goodwin suggests. [Petition,p.19]. Rather, it is a deliberate consideration of the totality of circumstances in each case in recognition of this Court's caution against rigidity.[16] "The methods of presenting a *prima facie* case are flexible and depend on the particular situation." *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010) (citing *Wilson*, 376 F.3d at 1087).

> More than one formulation of the elements of a *prima facie* case exist. The court in *McDonnell Douglas* recognized this when it articulated four elements for a *prima facie* case but stated that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required . . . is not necessarily applicable in every respect to differing factual situations." Appellees correctly argue that one way of establishing a

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[16] "The *prima facie* case method . . . was 'never intended to be rigid, mechanized, or ritualistic.'" *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. at 1478, 1482 (1983).

> *prima facie* case of employment discrimination [ ] requires the plaintiff to show that . . . [his misconduct] was the same or similar misconduct to that which a similarly situated employee engaged in, but was not similarly disciplined for."

Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1275 (11th Cir. 2008) (Holding the plaintiff did not show a comparator but did meet her *prima facie* case by showing other evidence of discrimination.) (Internal citations omitted) (emphasis added).

The Eleventh Circuit's "nearly identical" standard is in accord with other circuits and with the directives of this Court and is an appropriate mechanism to ensure comparison of apples with other apples, not with oranges.

III. CHANGING THE "NEARLY IDENTICAL" STANDARD WILL NOT AFFECT GOODWIN'S *PRIMA FACIE* CASE.

Even if identification of a comparator were required, and even if the "nearly identical" standard were completely ignored, or mal-applied as Goodwin contends, Goodwin's claim still fails.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), this court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 310 (1996) (quoting *St. Mary's*

Honor Center v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742, 2746 (1993)). The *McDonnell Douglas* proof construct requires that a plaintiff first create a presumption of discrimination[17] by establishing the minimum requirements of a *prima facie* case. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate "some legitimate, nondiscriminatory reason" for its actions. *Id.* When the employer satisfies its burden of production, the burden of proof shifts a second time to the plaintiff to prove that each of the proffered legitimate, nondiscriminatory reasons are pretextual. *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825.[18]

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[17] Under the *McDonnell Douglas* scheme, establishment of the *prima facie* case "creates a presumption that the employer unlawfully discriminated against the employee." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.8, 101 S.Ct. 1089, 1094, n.8, 67 L.Ed.2d 207 (1981)).

[18] The *McDonnell Douglas* framework "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943 (1978). The burden-shifting framework triggered by a defendant's *prima facie* case is essentially just "a means of 'arranging the presentation of evidence'" *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-510, and n.3, 113 S.Ct. 2742 (1993).

This Court has made clear that once an employer satisfies its burden to articulate a legitimate, nondiscriminatory reason for its actions, the presumption raised by the *prima facie* case is rebutted and the plaintiff has "the full and fair opportunity to

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This case does not present any controversy regarding the Eleventh Circuit's *prima facie* case requirements or its "nearly identical" standard because the District Court accepted that Goodwin satisfied the nearly identical standard and established her *prima facie* case, but ultimately determined that Goodwin failed to carry her burden of proving that the City's legitimate nondiscriminatory reasons were merely pretext for discrimination.[19] [App.30a (promotion), 34a (discipline)]. Thus, even if this Court granted *certiorari* and issued a writ to the Eleventh Circuit rejecting its "nearly identical" standard, the result for Goodwin would be the same.[20]

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demonstrate, through presentation of his own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision, and that [the protected class] was." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-508 (1993) (internal quotations and citations omitted). The plaintiff always retains the "ultimate burden" of proving intentional discrimination. *Hicks*, 509 U.S. at 508 (quoting *Burdine*, 450 U.S. at 256).

[19] Furthermore, to the extent Goodwin disagrees with the District Court's determination that her evidence did not establish pretext, this is insufficient grounds for *certiorari*. *See* Supreme Court Rule 10; *Gonzales v. Crosby*, 125 S.Ct. 2641, 2655, n.7 (2005) (Stevens, J., dissenting) ("error-correction is a disfavored basis for granting review"); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., dissenting) ("[W]e cannot act as a court of simple error correction.").

[20] Goodwin also argues that contrary to the Eleventh Circuit, the First, Second, Third, Ninth, Tenth, and District of Columbia Circuits do not require a plaintiff to establish a similarly situated comparator as part of the *prima facie* case but only at the pretext stage. While this is not an accurate

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statement (see below), the shifting of the comparator analysis (from the *prima facie* case stage to the pretext stage) is not material to the outcome of this case.

The following recent cases in each of these circuits have required plaintiffs to establish a similarly situated person as part of their *prima facie* case:

First Circuit: *Prescott v. Higgins*, 538 F.3d 32, 41 (1st Cir. 2008) (The Hon. Sandra Day O'Connor, sitting by designation) ("To make out a *prima facie* case of racial discrimination in compensation under Title VII or § 1981, Prescott must show that . . . similarly-situated employees outside the protected class received more favorable treatment). *Second Circuit*: *Billue v. Praxair, Inc.*, 2008 WL 4950991, *1 (2d Cir. 2008) (Holding at the *prima facie* stage that "[the] plaintiff has not adequately established disparate treatment because his proposed "similarly situated" employee was materially distinct from plaintiff."); *Beauchat v. Mineta*, 257 F. App'x 463, 465 (2d Cir. 2007) (plaintiff failed his *prima facie* case where he "did not adduce evidence that other individuals identified for purposes of comparison were 'similarly situated in all material respects.'"); *Davis v. AT&T Wireless*, 157 F. App'x 360, 361-62 (2d Cir. 2005) (same); *Pilman v. N.Y. City Hous. Auth.*, 64 F. App'x 293, 296 (2d Cir. 2003) (same). *Third Circuit*: *Williams v. N.J. Trenton Psychiatric Hosp.*, 2009 WL 405640, *1 (3d Cir. 2009) ("To make out a *prima facie* case of employment discrimination under Title VII, a plaintiff must show that . . . other similarly situated persons not in the protected group received better treatment."); *Grassmyer v. Shred-It USA, Inc.*, 2010 WL 3330102, *8 (3d Cir. 2010) (recognizing that "[a]s an alternative to the original fourth prong of the *prima facie* case [articulated in *McDonnell Douglas*], a plaintiff may show that similarly situated individuals outside the plaintiff's class were treated more favorably.) (citing cases); *Brown v. Hamot Med. Ctr.*, 323 F. App'x 140, 143 (3d Cir. 2009) ("Suffice it to say that we agree with the District Court that Brown has not shown that any similarly situated male resident was treated more favorably than she. The Court correctly concluded that Brown failed to establish a *prima facie* case."). *Ninth Circuit*: *Anthoine v. N. Cent. Counties Consortium*, 605 F.3d 740, 753 (9th Cir. 2010)

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A. Goodwin's Promotion

The District Court's analysis already factored in establishment of the *prima facie* case.[21] Goodwin's claim failed because she could not overcome the City's "straightforward" explanation for why she was not given the promotion – the male sergeant "was given the duty assignment because he outranked Plaintiff."

("To establish a *prima facie* case under *McDonnell Douglas*, a plaintiff must demonstrate that . . . similarly situated employees not in his protected class received more favorable treatment."); *Mitchell v. Superior Court of Cal. San Mateo*, 312 F. App'x 893, 894 (9th Cir. 2009) ("the record does not contain any evidence indicating that the Superior Court treated other similarly situated employees outside of the protected class differently. Mitchell has failed to establish a *prima facie* case."). *Tenth Circuit*: *Fulcher v. City of Wichita*, 2010 WL 2825690, *3 (10th Cir. 2010) ("the plaintiff has the burden to establish a *prima facie* case of discrimination, which requires him to show . . . disparate treatment among similarly situated employees."); *Sydney v. ConMed Elec. Surgery*, 275 F. App'x 748, 751 (10th Cir. 2008) (same).

[21] As the District Court found:

> Without performing a detailed analysis of the prestige associated with the Watch Relief Supervisor duty, I will assume that being passed over for this position is an adverse employment action. It is undisputed that both times Plaintiff was passed over for the Watch Supervisor position that the position was given to a male officer. Thus, Plaintiff has made her *prima facie* case of discrimination under *McDonnell Douglas*.

[App.29a-30a (emphasis added)].

[App.30a]. The District Court found that rather than attacking the City's position "head on," Goodwin only argued that she "deserved the promotion." [App.30a]. As the Court stated:

> None of Plaintiff's complaints about why she did not receive the [promotion] call into question Defendant's nondiscriminatory reason for its action. Importantly, Plaintiff has provided no reason whatsoever for her complaint that [the male sergeant] received the position over her. Plaintiff's inability to cast sufficient doubt on Defendant's proffered nondiscriminatory reason means that Plaintiff's argument fails.

[App.31a].

Despite "the full and fair opportunity to demonstrate, through presentation of [her] own case and through cross-examination of the [City's] witnesses, that [its] proffered reason was not the true reason for the employment decision, and that [gender] was," *Hicks*, 509 U.S. at 507-508, Goodwin's claim failed. This determination was made by the District Court after it made the assumption that Goodwin had indeed satisfied her *prima facie* case. [App.29a-30a]. The nearly identical standard did not act as a barrier to her claim.

On *de novo* review, the Eleventh Circuit first found that Goodwin failed to identify a male comparator similar to her in any relevant respect:

> [T]he record also shows that the male officer was promoted because he (a sergeant) outranked Goodwin (a corporal) in the Department. Based on the difference in her rank, Goodwin has failed to show that she and the male officer who was promoted to the Relief Supervisor position were similarly situated.

[App.10a]. Nevertheless, the Eleventh Circuit also assumed that Goodwin had met the "nearly identical" standard and satisfied her *prima facie* case. [App.10a-11a]. Even under this assumption, the City remained entitled to summary judgment.

> [A]s the City articulated a legitimate, non-discriminatory reason for the alleged adverse action, i.e. the male officer was of a higher rank than Goodwin, it has satisfied the second phase of the burden-shifting framework of *McDonnell Douglas*. Goodwin did not present any evidence that the City's legitimate, non-discriminatory reason for promoting the higher-ranking male officer, instead of her, was pretextual.

[App.10a-11a (emphasis added)].

Both the District Court and the Eleventh Circuit denied Goodwin's discriminatory promotion claim without restraint by the "nearly identical" requirement.

B. Goodwin's Termination

The District Court's analysis was the same for Goodwin's discriminatory discipline/termination claim. After assuming that Goodwin met the Eleventh Circuit's "nearly identical" standard and satisfied her *prima facie* case [App.34a], the District Court found that the City's proffered nondiscriminatory reasons were "sound" and that Goodwin failed to establish pretext:

> Even if Plaintiff had established a *prima facie* case, Defendant's legitimate, nondiscriminatory reasons are sound. The I.A. investigation was conducted in a routine manner in accordance with Department policies and procedures following the complaint lodged against Plaintiff. The I.A. investigation recommended termination based on seven violations of Department policy – five of which [Goodwin] later admitted in her resignation.

[App.34a]. In determining that Goodwin failed to establish pretext, the District Court found it significant that Goodwin "fully admitted to violating five Department policies." [App.21a,35a].

On appeal, the Eleventh Circuit affirmed the District Court's finding that Goodwin had not satisfied her *prima facie* case noting that there was no showing that any proffered comparator violated all of the same Rules and Regulations or that their alleged misconduct was nearly identical to hers. [App.11a,14a,15a]. In this section of its analysis, the

Court elected not to re-examine its determination just pages earlier in the promotion analysis that the City had articulated a legitimate, nondiscriminatory reason for its actions and that Goodwin did not present any evidence of pretext. [App.10a,11a,13a-15a].

IV. THE "NEARLY IDENTICAL" STANDARD IS NOT AT ISSUE AND SUMMARY JUDGMENT WAS APPROPRIATE.

"It matters not whether [Goodwin] has made out a *prima facie* case if she cannot create a genuine issue of material fact as to whether [the City's] proffered reasons for firing her are pretext masking discrimination." *Rioux,* 520 F.3d at 1265.

Goodwin convinces herself that the District Court and the Eleventh Circuit erroneously required her to demonstrate a comparator who violated the exact same seven violations as she. [Petition,p.6]. Although Goodwin complains that it was impossible for her to find such a comparator, she was not required to do so. Having chosen that method of proof, however, Goodwin failed to even establish that any male was ever found guilty of committing her most serious offense – lying during an internal investigation – and was treated more favorably.

Notwithstanding the other six violations, lying during her I.A. investigation was unquestionably the most serious (and termination worthy) offense. Forget that Goodwin failed to show a comparator engaging in all seven violations – she also failed to show a

comparator engaging in this single most important offense. As the District Court recognized:

> When it comes to disciplining employees for honesty violations, Defendant is entitled to treat Plaintiff's violation of its honesty policy as more severe than a violation of its other policies. *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d at 1311-12 ("Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules.").

[App.33a-34a].

When the investigation revealed that a male officer and another female officer also lied in the investigation, they too were immediately terminated. [App.21a; R.30-7,¶32]. A second male avoided termination only by admitting to his untruthfulness and recanting. His ultimate honesty saved his job but still landed him a five day suspension. [R.30-7,¶32].

In support of its reasons for termination, the City proffered five other male officers who were found to have lied. [R.30-7,¶40]. All were terminated. There is no possible inference of discrimination to be drawn.

Goodwin's argument that the District Court and Eleventh Circuit should have considered her unsubstantiated allegations of other employee misconduct is equally without merit. Of particular importance to the District Court on Goodwin's proposed comparators was the fact that she offered "no evidence" that

any supervisors were even aware of the alleged misconduct:

> With regard to her *prima facie* case:
>
> Plaintiff offers no evidence that any of the officers she complains of were ever reported up the chain of command as she was. It is undisputed that the Department cannot take formal personnel action if no complaint was filed or if supervisors were otherwise unaware of disciplinary problems within their ranks. A plaintiff's allegations of unverified misconduct by other employees in an attempt to make those employees into comparators are insufficient to sway a court.

[App.32a-33a].

> With regard to pretext:
>
> In her attempt to establish pretext, Plaintiff provides a laundry list of male employees who were not punished for various activities. . . . Plaintiff fails to show that Department policies were ever inconsistently applied, however. Plaintiff provides no evidence that any of the alleged violations were ever reported and [therefore] cannot establish that the male employees were similarly situated to her.

[App.34a-35a].

No matter how "similar" the misconduct, no employee can be "similarly situated" – under any standard – absent some evidence that the decisionmaker

was even aware of the misconduct. Goodwin's failure to establish that the City treated males who lied during an internal investigation differently is alone sufficient to find that she failed to identify a similarly situated comparator.

On a final note, Goodwin strongly suggests that whether a comparator is similarly situated is a question for the jury and not for the Court. [Petition,pp.19,36]. This argument is not new. Relying on multiple decisions of this Court, the Eleventh Circuit long ago confirmed the propriety of summary judgment in employment discrimination cases.

> While acknowledging that questions of fact in job discrimination cases are "both sensitive and difficult" and "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," the Supreme Court has told us that "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524, 113 S.Ct. 2742, 2756, 125 L.Ed.2d 407 (1993) (quoting *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)). And quite recently, the Court rejected a rule which would have made it easier for job discrimination plaintiffs to get their case to a jury, explaining that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts

> should not treat discrimination differently from other ultimate questions of fact." *Reeves*, 120 S.Ct. at 2109 (internal quotation and citation omitted). The long and short of it is that the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the scale.

Chapman v. AI Transport, 229 F.3d 1012, 1026 (11th Cir. 2000).

CONCLUSION

"Nearly identical" means – "*similarly situated in all relevant respects*." This is, at the core, the same analytical framework applied in every other circuit regardless of the word labels chosen by those circuits.

If there is a case where application of the "nearly identical" standard is determinative, this is not it. Goodwin's case fails even if the Court had applied a "comparatively similar" standard (or any other standard deemed by Goodwin to be "less demanding"), even if it was applied in the pretext stage (as opposed to an element of Goodwin's *prima facie* case), and even if the standard was abandoned altogether.

The Eleventh Circuit's "nearly identical" standard has existed since 1982 and is in accord with the directives of this Court. Goodwin's Petition offers no reason to fix something that is not broken. The Petition for Writ of *Certiorari* is nothing more than an

appeal to this Court to second-guess the City's business judgment and it should be denied.

Respectfully submitted,

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